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WRIT OF ERROR.
(Issued April 7, 1916.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

<i>The United States of America</i>	}	March Term, 1912. No. 1.
v.		
<i>Chesapeake and Delaware Canal Company.</i>		

UNITED STATES OF AMERICA, } ss.:
DISTRICT OF DELAWARE, }

THE PRESIDENT OF THE UNITED STATES,
*To the Honorable, the Judge of the District Court of
the United States for the District of Delaware,*
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between the United States of America, plaintiff, and Chesapeake and Delaware Canal Company, a corporation of the State of Delaware, defendant, a manifest error has happened to the great damage of the said Chesapeake and Delaware Canal Company, as by its complaint appears. We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same,

to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at Philadelphia, Pennsylvania, on Saturday, the sixth day of May, A. D. 1916, in the said United States Circuit Court of Appeals for the Third Circuit, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Third Circuit may cause further to be done therein, to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD G. BRADFORD, Judge of the District Court of the United States for the District of Delaware, at Wilmington, in said District, this seventh day of April, A. D. 1916.

(Sgd.) WM. G. MAHAFFY,
(Seal) *Clerk United States District Court,*
District of Delaware.

Allowed by,
(Sgd.) EDWARD G. BRADFORD,
J.

UNITED STATES OF AMERICA, }
DISTRICT OF DELAWARE, } ss.:

BE IT REMEMBERED, That at a District Court of the United States for the District of Delaware, begun and held at the United States Court House and Post Office Building, in the City of Wilmington, Delaware, in the said District of Delaware, at the time and place required by law, among other, the following proceedings were had, to wit:

The United States of America,
Plaintiff,

v.

Chesapeake and Delaware
Canal Company, a Corpora-
tion of the State of Dela-
ware,

Defendant.

No. 1.

March Term, 1912.
Summons in Case.

DOCKET ENTRIES.

- | | | |
|-------------|-----|--|
| 1912, March | 4. | Praeipie filed and summons issued returnable 2d Tuesday in March, instant. |
| 1912, March | 12. | Marshal returns on Summons "Served", &c.; same day writ filed. |
| 1912, March | 13. | Defendant appears by Andrew C. Gray, Esqr., its attorney; same day praeipie filed. |
| 1912, April | 27. | Narr filed and rule pleas on or before 1st Monday in June, next (Exit rule). |
| 1912, June | 4. | Defendant's pleas filed. |
| 1912, June | 6. | Plaintiff's replication to 1st plea and declination to reply to 2d and 3d pleas of defendant until the same are drawn out, filed; same |

Docket Entries

day rule that defendant draw out said pleas on or before 24th inst. (Exit rule.)

- | | | |
|--------------|-----|---|
| 1912, July | 19. | Defendant's plea of Statute of Limitations and declination to draw out plea of Release, filed. |
| 1912, August | 12. | Demurrer of Plaintiff to said plea of Statute of Limitations, and motion of plaintiff to strike out plea of "Release" filed; same day rule that defendant file joinder on or before 22nd inst. (Exit rule.) |
| 1912, August | 19. | Defendant's joinder in demurrer, filed. |
| 1912, Dec. | 20. | Order setting demurrer down for hearing on February 11, 1913, at 11 o'clock a. m. |
| 1913, Feby. | 11. | Hearing on demurrer. |
| 1913, March | 18. | Opinion of court on demurrer to plea of statute of limitations handed down and filed. |
| 1913, April | 18. | Order sustaining demurrer of plaintiff to plea of statute of limitations of defendant, with leave to defendant to plead over within five days from this date. |
| 1913, April | 29. | Order striking out defendant's plea of "Release", and setting case for trial at June Term, A. D. 1913. |
| 1913, Nov. | 10. | Order granting defendant general leave to amend. |
| 1913, Dec. | 3. | Defendant's additional plea filed, and rule replication on or before 13th inst. (Exit rule.) |
| 1913, Dec. | 10. | Plaintiff's declination to reply to defendant's additional plea of "Payment" until the same is |

drawn out, filed; same day rule on defendant to draw out said plea on or before 20th inst.

1913, Dec. 26. Defendant's plea of Payment drawn out, filed.

1914, Sept. 1. Plaintiff's replication to defendant's plea of payment, filed, and rule rejoinder on or before 11th inst. (Exit rule.)

1914, Sept. 10. Defendant's rejoinder and issue, filed. (Exit copy to plaintiff's attorney.)

1914, Oct. 12-13. Trial.

VERDICT.

For the United States of America, and its damages assessed at the sum of sixty thousand one hundred and eleven dollars and nineteen cents (\$60,111.19) with six cents costs and its costs in this suit expended.

1914, Oct. 13. Defendant moves the court for a new trial and in arrest of judgment; same day order that reasons in support of said motion be filed within twenty days.

1914, Nov. 2. Reasons of defendant for new trial, filed.

1914, Nov. 4. Order granting leave to defendant to withdraw its motion in arrest of judgment; same day said motion withdrawn.

1914, Nov. 4. Hearing of motion for new trial; same day order denying said motion.

1914, Nov. 4. Plaintiff moves for judgment on verdict; same day order that judgment be entered on the verdict.

Thereupon, it is now, this fourth day of November, A. D. 1914, considered and adjudged by the court that said The United States of America, Plaintiff, recover against the said Chesapeake and Delaware Canal Company, Defendant, the sum of Sixty thousand one hundred eleven dollars and nineteen cents (\$60,111.19) besides the costs in said cause to be taxed, and have execution therefor.

Attest:

(sgd) Wm. G. Mahaffy,
Clerk.

- | | | |
|------------|-----|---|
| 1914, Nov. | 4. | Costs taxed at \$242 72/100 and taxed bill, filed. |
| 1914, Nov. | 17. | Bill of exceptions signed and filed. |
| 1914, Dec. | 5. | Petition of said defendant, with assignments of error annexed, filed; same day order allowing writ of error, fixing amount of bond at Five hundred dollars and approving Fidelity and Deposit Company of Maryland, as surety on said bond; same day said order filed. |
| 1914, Dec. | 10. | Order approving bond of Chesapeake and Delaware Canal Company, with Fidelity and Deposit Company, as surety thereon, in the sum of Five hundred dollars, same day said bond, with order of approval endorsed thereon, filed. |
| 1914, Dec. | 10. | Writ of error, in duplicate, with allowance of District Judge thereon, issued, and duplicate lodged in clerk's office, &c. |
| 1914, Dec. | 10. | Citation to plaintiff-defendant in error, issued. |

- | | | |
|------------|-----------------|--|
| 1914, Dec. | 14. | Citation with acceptance of service by John P. Nields, Esq., U. S. Attorney, endorsed thereon, filed. |
| 1914, Dec. | 15. | Praecept of attorney for defendant for making up transcript of record, filed. |
| 1915, July | 8. | Mandate of United States Circuit Court of Appeals for the Third Circuit reversing judgment of the District Court and awarding a new trial, handed down and filed. |
| 1915, July | 14. | Order setting case down for trial on Monday, October 11, 1915, at 11.30 o'clock in the forenoon. |
| 1915, Nov. | 15. | Order continuing said cause until December Term next of said court and setting said cause for re-trial on Tuesday, January 4, 1916, at 11.30 o'clock A. M . |
| 1916, Jan. | 4, 5, 6, 7, 10. | Trial. |
| | | VERDICT. |
| | | For the United States of America and its damages assessed at the sum of sixty-three thousand nine hundred and twenty-four dollars and sixty-six cents (\$63,924 66/100), with six cents costs and its costs in this suit expended. |
| 1916, Jan. | 12. | Order granting leave to file defendant's reasons for new trial; same day said reasons filed. |
| 1916, Jan. | 21. | Order denying application for new trial and that judgment be entered; same day said order filed. |
| 1916, Jan. | 21. | Thereupon, it is now, this twenty-first day of January, A. D. 1916, considered and adjudged by the court that said The United States of America, plaintiff, recover against the said Chesapeake and |

Docket Entries

- Delaware Canal Company, defendant, the sum of sixty-three thousand nine hundred and twenty-four dollars and sixty-six cents (\$63,-924 66/100, besides the costs in said cause to be taxed, and have execution therefor.
- 1916, Feb. 11. Bill of exceptions signed and filed.
- 1916, Mar. 30. Petition of said defendant, with assignments of error annexed, filed; same day order allowing writ of error, fixing amount of bond at \$500 and approving Fidelity and Deposit Company of Maryland as surety on said bond; same day said order filed.
- 1916, Mar. 30. Motion of defendant, filed; same day order for transmission of certain original exhibits to Clerk U. S. Circuit Court of Appeals; same day said order filed.
- 1916, Mar. 30. Praecept for making up transcript of record filed.
- 1916, April 7. Order approving bond of Chesapeake and Delaware Canal Company, with Fidelity and Deposit Company as surety thereon, in the sum of five hundred dollars; same day said bond, with order of approval endorsed thereon, filed.
- 1916, April 7. Writ of error, in duplicate, with allowance of District Judge thereon, issued and duplicate lodged in Clerk's office.
- 1916, April 7. Citation to plaintiff-defendant in error, issued.
- 1916, April 7. Citation, with acceptance of service by Charles F. Curley, Esq., U. S. Attorney, endorsed thereon, filed.

DECLARATION.

(Filed April 27, 1912.)

IN THE DISTRICT COURT OF THE UNITED STATES IN AND
FOR THE DISTRICT OF DELAWARE.

The United States of America,
Plaintiff,

v.

*Chesapeake and Delaware Canal
Company, a Corporation of
the State of Delaware,*
Defendant.

Summons in Case.

DISTRICT OF DELAWARE, ss.:

Chesapeake and Delaware Canal Company, a corporation of the State of Delaware, was summoned to answer The United States of America of a plea of trespass in the case upon promises, and thereupon the said The United States of America by John P. Nields, United States Attorney for the District of Delaware, complains:

1. For that whereas the said defendant, heretofore, to wit, on the thirtieth day of June in the year of our Lord, one thousand eight hundred and seventy three, at the District of Delaware aforesaid, was indebted to the said plaintiff in the sum of twenty-one thousand nine hundred and thirty-seven dollars and fifty cents (\$21,937.50), lawful money, for so much money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so thereof indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the District of Delaware aforesaid, undertook and then and there faithfully promised the said plaintiff to pay to the said plaintiff the said last-mentioned sum of money when the said defendant should be thereunto afterwards requested. That after-

wards, to wit, on the seventeenth day of November in the year of our Lord, one thousand nine hundred and eleven, at etc., to wit, at the District of Delaware aforesaid, the said plaintiff made demand upon the said defendant at the proper office of the said defendant, for the payment of said last-mentioned sum of money.

2. And whereas also the said defendant afterwards, to wit, on the thirtieth day of June in the year of our Lord, one thousand eight hundred and seventy-five, at the District of Delaware, aforesaid, was indebted to the said plaintiff, in the further sum of fourteen thousand six hundred and twenty-five dollars (\$14,625), like lawful money, for so much money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the District of Delaware aforesaid, undertook and then and there faithfully promised the said plaintiff to pay to the said plaintiff the said last-mentioned sum of money when the said defendant should be thereunto afterwards requested. That afterwards, to wit, on the seventeenth day of November, in the year of our Lord, one thousand nine hundred and eleven, at etc., to wit, at the District of Delaware aforesaid, the said plaintiff made demand upon the said defendant at the proper office of the said defendant for the payment of said last-mentioned sum of money.

3. And whereas also the said defendant afterwards, to wit, on the thirtieth day of June, in the year of our Lord, one thousand eight hundred and seventy-six, at the District of Delaware aforesaid was indebted to the said plaintiff, in the further sum of fourteen thousand six hundred and twenty-five dollars (\$14,625), like lawful money, for so much money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so indebted, the said defendant, in consideration thereof, after-

wards, to wit, on the day and year last aforesaid at the District of Delaware aforesaid, undertook and then and there faithfully promised the said plaintiff to pay to the said plaintiff said last-mentioned sum of money when the said defendant should be thereunto afterwards requested. That afterwards, to wit, on the seventeenth day of November in the year of our Lord, one thousand nine hundred and eleven, at etc., to wit, at the District of Delaware aforesaid, the said plaintiff made demand upon said defendant at the proper office of the said defendant for the payment of said last-mentioned sum of money.

4. And whereas also the said defendant afterwards, to wit, on the seventeenth day of November, in the year of our Lord, one thousand nine hundred and eleven, at the District of Delaware aforesaid, was indebted to the said plaintiff, in the further sum of one hundred and fifty thousand dollars (\$150,000), like lawful money, for so much money before that time and then due and payable from the said defendant to the said plaintiff, for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiff, and by the said plaintiff forborne to the said defendant, for divers long spaces of time, before then elapsed, at the like special instance and request of the said defendant. And being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the District of Delaware aforesaid, undertook and then and there faithfully promised the said plaintiff to pay to the said plaintiff the said last-mentioned sum of money when the said defendant should be thereunto afterwards requested. That afterwards, to wit, on said seventeenth day of November, in the year of our Lord, one thousand nine hundred and eleven, at, etc., to wit, at the District of Delaware aforesaid, the said plaintiff made demand upon said defendant at the proper office

of the said defendant for the payment of said last-mentioned sum of money.

Nevertheless the said defendant not regarding its said several promises and undertakings in the four preceding paragraphs of this declaration but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff although often requested so to do; but the said defendant to pay the said plaintiff the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff of two hundred and fifty thousand dollars (\$250,000), and therefore it brings its suit, etc.

(Sgd.) JOHN P. NIELDS,
*United States Attorney,
District of Delaware*

BILL OF PARTICULARS.

Chesapeake and Delaware Canal Company,
a Corporation of the State of Delaware,

To

The United States of America, Dr.

To sums of money due and owing to The United States of America as the owner and holder of fourteen thousand six hundred and twenty-five (14,625) shares of the capital stock of said Chesapeake and Delaware Canal Company, being its pro rata share of dividends declared by said Chesapeake and Delaware Canal Company and also the interest due and owing to The United States of America on said sums of money.

Sum of money due said United States,
being its share of dividend declared
June 30, 1873.

\$21,937.50

Interest on said sum of \$21,937.50 from
and after June 30, 1873.

Sum of money due said United States, being its share of dividend declared June 30, 1875.	14,625.00
Interest on said sum of \$14,625.00 from and after June 30, 1875.	.
Sum of money due said United States, being its share of dividend declared June 30, 1876.	14,625.00
Interest on said sum of \$14,625.00 from and after June 30, 1876.	

DEFENDANT'S PLEAS.

(Filed June 4, 1912.)

The defendant in the above-stated cause, by its attorney, Andrew C. Gray, Esq., pleads to the declaration of the plaintiff heretofore filed in the above-stated cause, as follows:

1. Non Assumpsit.
2. Release.
3. Statute of Limitations.

(Sgd.) ANDREW C. GRAY,
Attorney for Defendant.

June 4, 1912.

PLAINTIFF'S REPLICATION TO FIRST PLEA
AND DECLINATION TO REPLY TO SECOND
AND THIRD PLEAS UNTIL DRAWN OUT.

(Filed June 6, 1912.)

The plaintiff, by John P. Nields, United States Attorney for the District of Delaware, enters reps and issues to the first plea filed by the defendant in the above-stated case, and declines to reply to the plea of "Statute of Limitations" and to the plea of "Release" until the same are drawn out, and rules that the same be drawn out by the next general rule day.

(Sgd.) JOHN P. NIELDS,
*United States Attorney,
District of Delaware.*

June 6, 1912.

PLEA OF STATUTE OF LIMITATIONS.

(Filed July 19, 1912.)

And now, to wit, the said defendant, in accordance with the Rule issuing out of the said District Court on the sixth day of June, A. D. 1912, that the said defendant should draw out its said pleas of Statute of Limitations, and Release heretofore pleaded by it pleads as follows:

And for a further plea in this behalf the said Chesapeake and Delaware Canal Company, by leave of the Court here for this purpose first had and obtained, according to the form of the statute in this case made and provided, says that The United States of America ought not to have or maintain its aforesaid action thereof against it, because it says that the said several supposed causes of action, or any or either of them, in the said Declaration mentioned did not accrue at any time within three years next before the commencement of this suit, in manner and form as the same The United States of America hath above thereof complained against it the said Chesapeake and Delaware Canal Company; and this it the said Chesapeake and Delaware Canal Company is ready to verify. Wherefore it prays judgment if the said The United States of America ought further to have or maintain its aforesaid action thereof against it, &c.

And as to the said plea of Release the said defendant declines to draw out the same.

**CHESAPEAKE AND DELAWARE
CANAL COMPANY,**

By

(Sgd.) **WARD, GRAY & NEARY,**
Its Attorneys.

**DEMURRER TO PLEA OF STATUTE OF
LIMITATIONS.**

(Filed August 12, 1912.)

And the said plaintiff, by John P. Nields, United States Attorney for the District of Delaware, as to the further plea of the Statute of Limitations and the declination of said defendant to draw out the plea of "Release" filed by said defendant in said District Court on July 19, 1912, under the rule theretofore issued out of said Court saith:

As to the said further plea of the Statute of Limitations of the said defendant by it above pleaded the said plaintiff saith that the said matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiff from having or maintaining its aforesaid action thereof against the said defendant, and that the said plaintiff is not bound by law to answer the same. And this the said plaintiff is ready to verify. Wherefore, by reason of the insufficiency of the said further plea in this behalf, the said plaintiff prays judgment and damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to the said plaintiff, etc.

And as to the said plea of "Release" which the said defendant declines to draw out, the said plaintiff by John P. Nields, United States Attorney for the District of Delaware, moves the Court to strike out said plea of "Release" filed by the said defendant in this cause.

(Sgd.) JOHN P. NIELDS,
*United States Attorney,
District of Delaware.*

I, John P. Nields, United States Attorney for the District of Delaware, and attorney for the said plaintiff, being the demurrant in the above-stated cause, and counsel filing the above demurrer, do hereby certify that the foregoing demurrer, in my opinion is good in law, and is not filed for the purposes of delay.

(Sgd.) JOHN P. NIELDS,
*United States Attorney,
District of Delaware.*

JOINDER IN DEMURRER.

(Filed August 19, 1912.)

The said defendant, by Andrew C. Gray, Esq., its attorney, says that its further plea of the Statute of Limitations, and the matters therein contained, in manner and form as the same are there pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having or maintaining its aforesaid action thereof against it, the said defendant, and that it, the said defendant, is ready to verify and prove the same, when, where and in such manner as the said Court here shall direct and award; wherefore, in as much as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining its aforesaid action thereof against it, the said defendant, &c.

(Sgd.) ANDREW C. GRAY,
Attorney for Defendant.

OPINION OF COURT ON DEMURRER TO PLEA
OF STATUTE OF LIMITATIONS.

(Filed March 18, 1913.)

This is an action of assumpsit brought by The United States against the Chesapeake and Delaware Canal Company, a corporation of Delaware, for the recovery of dividends alleged to be due to the United States from it on 14,625 shares of its capital stock held and owned by the United States, together with interest thereon. The declaration contains four counts and a bill of particulars. The first three counts are for money had and received for the use of the United States, and the fourth count is for interest on such money. The bill of particulars is as follows:

"Bill of Particulars.

Chesapeake and Delaware Canal Company,
a corporation of the State of Delaware,

To The United States of America, Dr.

To sums of money due and owing to The United States of America as the owner and holder of fourteen thousand six hundred and twenty-five (14,625), shares of the capital stock of said Chesapeake and Delaware Canal Company, being its pro rata share of dividends declared by said Chesapeake and Delaware Canal Company and also the interest due and owing to The United States of America on said sums of money.

Sum of money due said United States,
being its share of dividend declared
June 30, 1873, \$21,937.50

Interest on said sum of \$21,937.50 from
and after June 30, 1873,

Sum of money due said United States,
being its share of dividend declared
June 30, 1875, 14,625.00

Interest on said sum of \$14,625.00 from
and after June 30, 1875,

Sum of money due said United States,
being its share of dividend declared
June 30, 1876, 14,625.00

Interest on said sum of \$14,625.00 from
and after June 30, 1876."

The defendant has pleaded to all the counts (1) non assumpsit, (2) release, and (3) statute of limitations. To the plea of the statute of limitations the United States has demurred, and upon this demurrer the case has been heard. It has been ably and exhaustively argued by counsel on both sides. The points involved, however, are few and simple. The demurrer to the plea of the statute of limitations operates as an admission by the defendant that the United States is and was the owner and holder of 14,625 shares of its capital stock and became entitled as such owner and holder to receive from it on the several dates mentioned in the bill of particulars when dividends were declared the sums of money therein specified, being the pro rata share due and owing to the United States of such dividends. All of the above dates were more than three years—the statutory period of limitation in Delaware for actions of assumpsit—after the last dividend became payable and before the bringing of this action.

In the absence of a federal statute limiting the time for the bringing of suit by the United States in its sovereign capacity for the recovery of money to be paid into the national treasury, the maxim *nullum tempus occurrit regi* has full application, and no state statute of limitations can bar the remedy. The question now to be decided has relation, not to estoppel or the disputable presumption of payment after the lapse of twenty years from the accruing of the cause of action, but solely to the statute of limitations of Delaware. There is nothing in the declaration or bill of particulars to indicate that the United States is prosecuting this action as a merely nominal party, or that it owned or held the above-mentioned shares of stock of the defendant or any part thereof in trust for or on account of any private beneficiary or enterprise; or that the moneys sued for, if recovered, would not go

into the national treasury and form part of the public funds to be devoted to public and not private purposes. It must be assumed, in the absence of an allegation to the contrary, that whatever moneys may be recovered in this action will be paid into the Treasury of the United States to be disposed of as part of the public moneys. Under these circumstances it is wholly immaterial that the United States became entitled to the money which, if recovered, is to go into the national treasury, through its ownership of stock of the defendant company or through an investment in any other form for its benefit. The United States in so suing for the recovery of money for the national treasury is proceeding in its sovereign capacity and cannot be defeated by a state statute of limitations. *United States v. Thompson*, 98 U. S. 486. *United States v. Hoar*, 26 Fed. Cas. No. 15,373. *United States v. Nashville & Ry. Co.*, 118 U. S. 120. *United States v. Knight*, 14 Peters 301, 315. *Lindsey v. Miller*, 6 Peters 666. *United States v. Belknap*, 73 Fed. 19. In *United States v. Nashville & Ry. Co.*, *supra*, the Court said:

“It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound.”

In *United States v. Beebe*, 127 U. S. 338, the court said:

“The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to

enforce a public right, or to assert a public interest, is established past all controversy or doubt. *United States v. Nashville &c. Railway Company*, 118 U. S. 120, 125, and cases there cited."

An examination of the authorities cited on the part of the defendant shows that most, if not all, of them have no application to this case. The defendant contends that:

"If the Government is not acting in its *sovereign capacity* but has chosen to buy stock in a corporation, thereby stepping down from its high position as a sovereign power, and becoming a stockholder, it must be bound by the same rules that regulate other stockholders."

This undoubtedly is true so far as substantive rights are concerned, but it does not bear upon the application of the maxim *nullum tempus occurrit regi*. The statute of limitations is part of the *lex fori*. It bars the remedy but does not destroy the right. However important, it is not included among the substantive rights of parties to litigation. It may be waived, and under the decisions in Delaware is waived unless pleaded. *Parker v. Whittaker*, 4 Harr. 416. In the cases cited on the part of the defendant language is often used which taken by itself would lend some color to the contention made by it. But the significance of that language must be determined by a consideration of the facts of the case in which it has been employed. And when thus considered it lends little, if any, support to the defendant's case. Among the cases cited for the defendant some support the proposition that ownership by the United States or by a state of the whole or any part of the capital stock of a corporation chartered by it will not defeat the jurisdiction of a circuit (now district) court of the United States or of a state court over a suit against such corporation for

the recovery of money or other property on the ground that the United States or the state enjoys immunity from being sued in such court. *United States Bank v. Planters' Bank*, 9 Wheat. 904. *Bank of Kentucky v. Wister*, 2 Peters 318. *Briscoe v. Bank of Kentucky*, 11 Peters 256. *Louisville Railroad Co. v. Letson*, 2 How. 497, 550. *Curran v. State of Arkansas*, 15 How. 304. *Southern Ry. Co. v. North Carolina R. Co.*, 81 Fed. 595. In *United States Bank v. Planters' Bank*, *supra*, the Court said:

"The state does not, by becoming a corporator, identify itself with the corporation. The *Planters' Bank of Georgia* is not the State of Georgia, although the state holds an interest in it. . . . The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank."

Other cases cited by the defendant support the proposition that a state bank, of which the state granting the charter owns all the stock, in issuing its notes does not emit bills of credit in violation of the Constitution of the United States. *Bank of Kentucky v. Wister*, 2 Peters 318. *Briscoe v. Bank of Kentucky*, 11 Peters 256.

Some cases referred to by the defendant establish the proposition that a corporation, all or a part of whose capital stock is owned by a state, is not by reason of such ownership entitled to represent the state

and rightfully claim preference or priority of payment over private persons. *State Bank v. Gibbs*, 3 McCord (S. C.) 377. *Fields v. Creditors of Wheatley*, 1 Sneed (Tenn.) 351.

The underlying principle of the three foregoing classes of cases is that ownership by the United States or a state of the whole or any part of the capital stock of a corporation, whether or not chartered by the United States or such state, does not operate to confer upon the corporation the privileges, prerogatives or immunities of sovereignty. These cases are wholly irrelevant to the point now before the Court for decision. They do not directly or indirectly deal with the applicability of the statute of limitations to an action brought by the United States or by a state.

There is abundant authority to the effect that the United States or a state, in becoming a stockholder of a corporation puts itself upon the plane occupied by other and private stockholders, and with respect to the corporate transactions and affairs is entitled to only an equality of substantive rights with those possessed by other stockholders. By its acquisition of stock it assents to the provisions of the charter creating and defining the rights and duties of stockholders; and it, therefore, acts in the capacity of a stockholder, not in the exercise of its sovereignty, but under and pursuant to the rights and duties conferred and imposed by the charter upon stockholders. As stated in *United States Bank v. Planters' Bank*, *supra*:

“As a member of a corporation, a government never exercises its sovereignty.”

And as repeated in substance in *Southern Ry. Co. v. North Carolina R. Co.*, *supra*:

“So far as respects the transactions of the corporation, its contracts, or its torts, the state exercises no power, enjoys no privilege, with re-

gard to them, not derived from the charter, or differing in any way with the power or privilege enjoyed by any other stockholder."

The equality between the United States, or a state, and the other stockholders of a corporation, as established by the authorities, is equality of rights, duties and privileges under the charter. Such equality has no application to a pure statute of limitations. Such a statute relates only to the remedy and as part of the *lex fori* is wholly outside of charter rights, duties and privileges. The cases, while recognizing that the substantive rights and duties of the United States or a state as a stockholder are similar and only equal to those of private stockholders, do not state or intimate that the United States or a state in suing for the recovery of dividends belonging to it, and to be paid into its treasury for public purposes, is not acting in a strictly sovereign capacity. On the whole it seems clear on both reason and authority that the maxim *nullum tempus occurrit regi* applies in full force to this case as presented on demurrer to the plea of the statute of limitations.

There is an essential distinction between a pure statute of limitations, on the one hand, and, on the other, time stipulations entering into and forming part of a contract on which the United States as one of the contracting parties brings suit; or a time limitation for an appeal, or the filing of pleadings, or the taking of other steps necessary to the due and orderly prosecution of legal or equitable remedies. And also where the law applicable to a contract is such that the giving of notice is a condition precedent to the fixing of the liability of a party, as, for instance, in the case of drawers and endorsers of bills of exchange, the obligation to give such notice binds the United States as holder and owner equally with a private holder and owner. But such and other cases are clearly distin-

guishable from that before this Court in that it involves the consideration of only a pure statute of limitations as being applicable or inapplicable to a suit by the United States in its sovereign capacity. No opinion is here expressed on the point whether a presumption of payment may or may not have arisen from the lapse of time after the dividends sued for were declared and before the commencement of this action which might be taken advantage of under a proper plea. But for the reasons above given the demurrer must be sustained, with leave to the defendant to plead over.

(Sgd.) EDWARD G. BRADFORD,
J.

March 18, 1913.

ORDER SUSTAINING DEMURRER.

(Entered April 18, 1913.)

Present: JOHN P. NIELDS, Esq., United States Attorney.

ANDREW C. GRAY, Esq., attorney for defendant.

Upon motion of Mr. Nields, it is Ordered by the Court that the demurrer of the plaintiff to the plea of the statute of limitations by the defendant above pleaded be, and the same hereby is, sustained, with leave to the said defendant to plead over within five days from the date hereof.

ORDER STRIKING OUT PLEA OF RELEASE.

(Entered April 29, 1913.)

Upon motion of John P. Nields, Esq., United States Attorney and attorney for plaintiff, it is Ordered by the Court that the plea of "Release" heretofore pleaded by the said defendant, be, and the same hereby is, stricken out.

ORDER GRANTING DEFENDANT LEAVE TO
AMEND.

(Entered November 10, 1913)

Upon motion of Andrew C. Gray, Esq., attorney for defendant, it is Ordered by the Court that the said defendant be and hereby is granted general leave to amend.

DEFENDANT'S PLEA OF PAYMENT.

(Filed December 3, 1913.)

The defendant, by leave of the Court first had and obtained, through Ward, Gray and Neary, its attorneys, files the following additional plea:

Payment.

(Signed.) WARD, GRAY & NEARY,
Attorneys for Defendant.

PLAINTIFF'S DECLINATION TO REPLY TO
PLEA OF PAYMENT UNTIL DRAWN OUT.

(Filed December 10, 1913.)

And the said plaintiff, by John P. Nields, United States Attorney for the District of Delaware, as to the additional plea of "Payment" filed by said defendant in said Court on December 3, 1913, by leave of the said Court first had and obtained saith: That the said plaintiff declines to reply to the said plea of "Payment" until the same is drawn out, and rules that the same be drawn out by the next general rule day.

(Sgd.) JOHN P. NIELDS,
*United States Attorney,
District of Delaware.*

December 10, 1913.

PLEA OF PAYMENT.
(Filed December 26, 1913.)

The Chesapeake and Delaware Canal Company, the defendant above named, by Ward, Gray and Neary, its attorneys, herein sets out its plea of payment made in the above-stated cause, as follows:

And for further Plea to the first Count of the Declaration in this cause filed in this behalf the said Chesapeake and Delaware Canal Company, defendant, by leave of the Court here for this purpose first had and obtained, according to the form of the Statute in such case made and provided, says that the said The United States of America ought not to have or maintain its aforesaid action thereof against it, because it says that after its promises and assumptions aforesaid in form aforesaid made, to wit, on the said thirtieth day of June in the year of our Lord One Thousand Eight Hundred and Seventy-three, at the District of Delaware aforesaid, it the said defendant well and faithfully paid to the said plaintiff the said sum of money, according to its promises and assumptions aforesaid; and this it is ready to verify. Wherefore it prays judgment if the said plaintiff ought to have or maintain its aforesaid action against it &c.

And for further Plea to the second Count of the Declaration in this cause filed in this behalf the said Chesapeake and Delaware Canal Company, defendant, by leave of the Court here for this purpose first had and obtained, according to the form of the Statute in such case made and provided, says that the said The United States of America ought not to have or maintain its aforesaid action thereof against it, because it says that after its promises and assumptions aforesaid in form aforesaid made, to wit, on the said thirtieth day of June in the year of our Lord One Thousand Eight Hundred and Seventy-five, at the District of Delaware aforesaid, it the said defendant well and

faithfully paid to the said plaintiff the said sum of money, according to its promises and assumptions aforesaid; and this it is ready to verify. Wherefore it prays judgment if the said plaintiff ought to have or maintain its aforesaid action against it &c.

And for further Plea to the third Count of the Declaration in this cause filed in this behalf the said Chesapeake and Delaware Canal Company, defendant, by leave of the Court here for this purpose first had and obtained, according to the form of the Statute in such case made and provided, says that the said The United States of America ought not to have or maintain its aforesaid action thereof against it, because it says that after its promises and assumptions aforesaid in form aforesaid made, to wit, on the said thirtieth day of June in the year of our Lord One Thousand Eight Hundred and Seventy-six, at the District of Delaware aforesaid, it the said defendant well and faithfully paid to the said plaintiff the said sum of money, according to its promises and assumptions aforesaid; and this it is ready to verify. Wherefore it prays judgment if the said plaintiff ought to have or maintain its aforesaid action against it &c.

(Sgd.) WARD, GRAY & NEARY,
Attorneys for Defendant.

REPLICATION TO PLEA OF PAYMENT.

(Filed September 1, 1914.)

And the said plaintiff, by John P. Nields, United States Attorney for the District of Delaware, as to the additional plea of "Payment" filed by said defendant in said District Court on December 26, 1913, under the rule therefor issued out of said Court, saith:

As to the said additional plea of "Payment" above pleaded to the first, second and third counts of the said Declaration, the said plaintiff saith that the said plain-

tiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining its aforesaid action thereof against the said defendant, because the said plaintiff saith, that the said defendant did not pay to the said plaintiff the said sums of money, in manner and form, as the said defendant hath above in its said plea in that behalf alleged; and this the said plaintiff prays may be inquired of by the country, &c.

(Sgd.) JOHN P. NIELDS,
*United States Attorney,
District of Delaware.*

REJOINDER.

(Filed September 10, 1914.)

Please enter Rejoinder and issue to plaintiff's Replication filed to defendant's additional plea of Payment.

(Sgd.) WARD, GRAY & NEARY,
Attorneys for Defendant.

To

William G. Mahaffy, Esq.,
Clerk U. S. District Court.

TRIAL.

January 4, 1916,

This day came the parties, and the issues herein came on to be tried; whereupon a jury was called to try the same, who came, to wit: William H. Hazel, Luther Marvel, William M. Hazel, J. Frank McWhorter, Theodore C. Simpson, Winfield Lattomus, Henry Burt Mitchell, Francis B. Watkins, George D. Turner, William H. Marvel, J. W. Watkins, and J. E. Walls, twelve free, honest and lawful men of the district, who were severally sworn or affirmed, and empanelled; and the trial not being concluded, the same was adjourned until tomorrow at eleven o'clock in the forenoon.

January 5, 1916.

This day came the parties, by their counsel, and the trial of the issues herein was resumed; and the trial not being concluded, the same was adjourned until tomorrow at eleven o'clock in the forenoon.

January 6, 1916.

This day came the parties, by their counsel, and the trial of the issues herein was resumed.

The clerk called the jurors empanelled in said cause and John W. Watkins, one of said jurors, did not answer.

Thereupon, the Court was advised by a telegram received from Dr. E. W. Kelsey, as follows:

“Mr. J. W. Watkins ill in bed with severe attack of influenza and under my care. Impossible to appear in court today.”

Thereupon, the respective parties, by their attorneys, agreed in open court to proceed with the trial of said cause without the said John W. Watkins, one of said jurors, and before the remaining eleven jurors empanelled in said cause.

Thereupon, the trial of said cause was proceeded with; and the trial not being concluded the same was adjourned until tomorrow at eleven o'clock in the forenoon.

January 7, 1916.

This day came the parties, by their counsel, and the trial of the issues herein was resumed; and the trial not being concluded, the same was adjourned until Monday next at eleven o'clock and thirty minutes in the forenoon.

January 10, 1916.

This day came the parties, by their counsel, and the trial of the issues herein was resumed.

VERDICT.

And the jurors aforesaid, upon their respective oaths and affirmations aforesaid, do say that they find for the plaintiff and assess its damages at the sum of sixty-three thousand nine hundred and twenty-four dollars and sixty-six cents (\$63,924.66), with six cents costs and the costs in this suit expended.

And afterwards, to wit, January 21, 1916, it is ordered and adjudged by the Court that the application of the defendant for a new trial be denied and that judgment on the verdict be entered in favor of said plaintiff and against the said defendant.

JUDGMENT.

Thereupon, it is now, this twenty-first day of January, A. D. 1916, considered and adjudged by the Court that said The United States of America, plaintiff, recover against the said Chesapeake and Delaware Canal Company, defendant, the sum of sixty-three thousand nine hundred and twenty-four dollars and sixty-six cents (\$63,924.66) besides the costs in said cause to be taxed, and have execution therefor.

And afterwards, February 11, 1916, came the parties, by their counsel, and the defendant, by Andrew C. Gray, Esq., its attorney, submitted its bill of exceptions, which was thereupon authenticated and signed by the Judge, and filed.

BILL OF EXCEPTIONS.
(Filed February 11, 1916.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF DELAWARE.

<i>The United States of America,</i>	}	No. 1. March Term, 1912. Summons in Case.
Plaintiff,		
v.		
<i>Chesapeake and Delaware Canal</i>		
<i>Company, a Corporation of</i>		
<i>the State of Delaware,</i>		
Defendant.		

Before HONORABLE EDWARD G. BRADFORD, D. J.

Present: JOHN P. NIELDS, ESQUIRE, U. S. District Attorney, appearing for the United States of America;

CHARLES BIDDLE, ESQUIRE, CHARLES J. BIDDLE, ESQUIRE, ANDREW C. GRAY, ESQUIRE, appearing for the defendant.

At the trial of the above stated cause the plaintiff, to maintain the issue on its part, introduced evidence as follows:

Wilmington, Delaware, January 4, 1916.

MICHAEL J. O'REILLY.

MICHAEL J. O'REILLY, a witness produced, sworn and examined, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Mr. O'Reilly, what is your business?

A. I am employed in the Treasury Department at Washington as executive clerk in the office of the Secretary of the Treasury, Division of Bookkeeping and Warrants.

Q. How long have you been so employed?

A. I have been employed in the Treasury Department a little more than twenty-one years—about fifteen years and a half of that time in the office of the Secretary.

Q. Are you acquainted with the various divisions of the Treasury Department and the custodians of the various documents?

A. I am, sir.

(Handing witness two paper writings.)

Q. I hand you two papers and will ask you what they are?

(After examination of paper writings.)

A. These are certificates of shares of capital stock of the Chesapeake and Delaware Canal Company owned by the United States.

Q. Where were these certificates obtained?

A. They were obtained in the office of the Secretary of the Treasury at Washington by me about October eleventh or tenth, 1914, from the custody of the Chief of the Division of Loans and Currency of the Secretary's office—delivered them to me.

MR. NIELDS: I offer the certificates in evidence.

(Certificates admitted in evidence and marked respectively, Certificate No. 235, "Government's Exhibit No. 1" and Certificate No. 560, "Government's Exhibit No. 2," without objection.)

WALTER HALL.

WALTER HALL, a witness produced, sworn and examined, on the behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. As secretary and treasurer of the Chesapeake and Delaware Canal Company you have been sub-

poenaed as a witness to produce stock ledger No. 2 of the Chesapeake and Delaware Canal Company. Will you produce it?

A. Yes. Do you mean the ledger that was impounded here about a year ago?

Q. Yes.

A. Here it is.

Q. What is this book?

A. Stock ledger of the Chesapeake and Delaware Canal Company.

Q. Will you turn to page 676?

A. Yes. I have done so.

Q. Do the entries on that page show the stockholding of the United States?

A. They do.

Q. At this date?

A. They do.

MR. NIELDS: I offer in evidence those entries in stock ledger No. 2 of the Chesapeake and Delaware Canal Company on page 676 thereof, relating to the stock of the United States.

THE COURT: I understand that it is agreed among counsel that just as soon as a copy is made it will be considered as in evidence, and in the meantime the evidence may go in as to the original page; that the copy which is substituted will be treated as evidence?

MR. NIELDS: That is entirely satisfactory.

(Page 676 of stock ledger No. 2 of the Chesapeake and Delaware Canal Company is admitted in evidence, without objection, and is as follows, being marked "Government's Exhibit No. 3":

(Handing witness book.)

Q. What is the book I now hand you, Mr. Hall?

A. The annual minute book of the Chesapeake and Delaware Canal Company for a period of years.

Q. Will you turn to the minutes of the meeting of the Proprietors of the Chesapeake and Delaware Canal Company, being its fifty-fourth annual meeting?

A. Of course, it is not in here as that.

Q. Being the meeting held on June second, 1873?

A. I mean to say that it is not in here as the "fifty-fourth" or the like of that. It is in here as years.

Q. Then the annual meeting of the Proprietors held on the second day of June, 1873?

A. June second, 1873. I have it.

Q. What did you state this book was?

A. The annual meeting book of the Chesapeake and Delaware Canal Company.

MR. NIELDS: I offer in evidence the resolution of the Proprietors declaring a dividend upon that date, as it appears upon the minutes of this meeting—restricting my tender to that resolution alone.

(Resolution admitted in evidence and marked, "Government's Exhibit No. 4", and is as follows:)

"Resolved, that a cash Dividend of Three per cent. be declared on the outstanding Capital Stock of the Company, payable to the Stockholders on and after the 9th inst."

Q. Turn to the minutes of the annual meeting of the Proprietors of the Chesapeake and Delaware Canal Company held on the seventh day of June, 1875.

A. I have it.

MR. NIELDS: I offer in evidence the resolution of the Proprietors declaring a two per cent. dividend on the capital stock of the company as set forth in the minutes of this meeting, restricting my tender to that offer.

THE COURT: It is admitted.

(Resolution admitted in evidence without objection and marked "Government's Exhibit No. 5"; and is as follows:)

"Resolved, That a Dividend of Two per cent. be declared on the outstanding Capital Stock of the Company, payable to the Stockholders on and after the 18th inst."

Q. I ask you now to turn to the minutes of the annual meeting of the Proprietors held on June fifth, 1876.

A. I have it.

MR. NIELDS: I offer in evidence the resolution of the Proprietors in regard to the declaration of a dividend at the annual meeting.

THE COURT: It will be admitted in evidence.

(Admitted in evidence, without objection, and marked "Government's Exhibit No. 6"; and is as follows:)

"Resolved, that a dividend of Two per cent. be declared on the outstanding Stock of the company, payable to the stockholders on the fifteenth inst."

MR. NIELDS: I offer in evidence a letter from the Secretary of the Treasury, dated November seventeenth, 1911, addressed to the Chesapeake and Delaware Canal Company.

THE COURT: Is there any objection?

MR. C. BIDDLE: No, sir.

THE COURT: Then it will be admitted.

(Letter admitted in evidence, without objection, and marked "Government's Exhibit No. 7".)

MR. NIELDS: I offer in evidence the reply of the President of the Chesapeake and Delaware Canal Company, dated December fourth, 1911.

THE COURT: Is there any objection?

MR. C. BIDDLE: No, sir.

THE COURT: Then it will be admitted in evidence.

(Letter admitted in evidence, without objection and marked, "Government's Exhibit No. 8".)

MR. NIELDS: In the meantime, gentlemen of the jury, these declarations of dividends, from the books of Chesapeake and Delaware Canal Company, in the years 1873, 1875 and 1876, are contained here, and the demand of the Secretary of the Treasury for the payment of the dividends, is embodied in the letter which the Court has admitted.

MR. GRAY: May I ask by number what ones you have asked him to produce?

MR. NIELDS: First, the dividend receipt book, No. 1, as here indicated.

MR. GRAY: I ask the purpose of this *duces tecum* for this No. 1? As I understand it, this dividend receipt book purports to contain, some or possibly all—I don't know—of the receipts that may have been given for dividends at different times. Whether it contains receipts, given for dividends of 1873, 1875 and 1876, I do not know. I suppose it does. Then my contention is that this is a material and affirmative defense, and we cannot be asked to produce our defense unless the counsel intends to be bound by it. If we produced it, it then, for the first time, could become material in this case, and is not material until it is produced by us by way of defense. Therefore, on the ground that at this time, in the presentation of the Government's case, it is immaterial, we object to producing it.

MR. NIELDS: Two duties rest upon the United States; one, to prove the existence of the debt. That has been done by producing the minute book

of this defendant company and showing the declaration of dividends in 1873, 1875 and 1876, by virtue of which the debt did arise at that time to the United States, and still exists by all of those declarations. The duty also rests upon the United States of submitting to this jury evidence that the dividends were not paid, in order to rebut the presumption of payment arising from the lapse of time; and the duty rests upon the United States to submit to this jury evidence of the non-payment of these dividends.

THE COURT: This bears on the question of non-payment?

MR. NIELDS: Undoubtedly. Can there be any more relevant evidence to show that the debt was not paid than that the debtor has retained in his files and has exhibited, as evidence of payment, fabricated and forged receipts? There isn't anything, the relevancy of which is more obvious, than that a forged and fabricated paper is intended to misrepresent a state of facts. These papers purport to show receipts by the United States of these dividends, whereas the United States proposes to establish that they are false, fabricated and fraudulent; and in order to meet that presumption, and in order to submit to this jury evidence of non-payment, these things that have been submitted by the defendant company, that have been exhibited by the defendant company, as evidence of payment, I propose to show are fabricated and false.

MR. C. BIDDLE: There is no evidence at all that these receipts have been exhibited by the defendant, at any time, to anybody. The claim of the Government is that we have certain receipts, and the District Attorney proposes to put those receipts in evidence, and then he proposes to go

on and show that they are not receipts. I think that at this time they are irrelevant, because—in addition to Mr. Gray's suggestion—suppose that should be true? That would simply show that thirty-eight years ago this debt was unpaid. That is all. That is not sufficient to rebut the presumption or, rather is not evidence to rebut the presumption which has arisen in the twenty years prior to the bringing of this suit.

MR. NIELDS: If I comprehend what Mr. Biddle has said, it is that I have not shown that they were exhibited. Of course, I have to get these documents in my hand before I can interrogate the witness as to the evidence they contain; and I simply produced this witness and asked him to bring to the stand those things. The next step, will, of course, be, what use was made by the defendant of these papers, and their character.

THE COURT: The understanding of the Court is that, for the time being, at least, the Circuit Court of Appeals has established a law applicable to this case; that it is part of the Government's case not merely to show the original indebtedness, but also to adduce evidence that that indebtedness has not been paid. It is upon that ground that you offer this proposed evidence?

MR. NIELDS: It is.

THE COURT: I think it is admissible. Of course, it does not follow at all—I am not expressing an opinion now—but assuming for the sake of the argument that there was a forged and wrong date a long, long time ago, say thirty years ago—

MR. C. BIDDLE: Thirty-eight years ago, in 1873.

THE COURT: It does not follow from that fact that this indebtedness has not been paid, but the Court thinks it is material as evidencing the atti-

tude of this company at that time. The Court is not prepared to rule it out. The Court would be decidedly inclined to agree with the proposition advanced by Mr. Biddle if it stood entirely alone; after this lapse of time, it would not be sufficient, but I understand this is only a part of your case?

MR. NIELDS: It is.

THE COURT: Upon that ground I admit it, not as in and by itself as reasonable presumption, but as bearing upon the question. I suppose it goes without saying that the presentation of a forged voucher would be evidence of the non-payment at that time and also of the non-payment at any time prior to that time; but you offered this in connection with evidence which you must produce for the purpose of showing that the company had never since paid the indebtedness.

MR. NIELDS: Yes, sir.

THE COURT: The Court will let it in for what it is worth, and how much it will be worth will depend on what evidence you follow it up with.

(Exception noted for defendant.)

Q. Have you produced the dividend receipt book?

A. I have.

Q. Will you turn to the page relating to the dividends due the United States on dividends 15, 16 and 17?

A. Where the names "William Y. Beale" and "Henry V. Leslie" appear?

MR. GRAY: I ask that your Honor will allow us an exception to any questions that may be asked concerning this book.

THE COURT: I think you had better make the objection to each question.

MR. GRAY: Then I object to this question.

THE COURT: You do not object to his (witness) turning to the page?

MR. GRAY: No, sir.

THE COURT: If you want to make an objection, then wait until the next question is asked, if you insist on it.

MR. GRAY: I have no desire to insist upon objection to his turning to a page, nor have I any desire to make the record bristle with objections. I simply ask an opportunity to enter an objection. I do not care to object in each instance if a general objection will serve the purpose. I do enter an objection to all the questions asked about this book.

THE COURT: I think it would cause confusion to enter a general objection. When any question is asked that is objectionable, in your judgment, you can ask for an exception and an exception will very properly be noted.

Q. Will you produce a paper purporting to be a letter from the Secretary of the Treasury under date of October twenty-sixth, 1874, signed "J. F. Hartley"?

MR. GRAY: We object as being immaterial and irrelevant.

THE COURT: The Court cannot pass upon that because the Court does not know what is in the paper.

MR. GRAY: I think my friend stated what it was in his question. It was copied from the *duces tecum*, a paper purporting to be a letter from the Secretary of the Treasury under date of October twenty-sixth, 1874.

THE COURT: You object to it upon the ground that it is immaterial?

MR. GRAY: Yes, sir.

THE COURT: The paper may turn out to be relevant, but if it is irrelevant, it cannot hurt you.

MR. NIELDS: The relevancy of this paper appears from this: That the Government proposes

to follow this up by evidence that immediately before and following the bringing of this suit this paper was exhibited by this defendant as evidence of payment of the dividend of 1873.

THE COURT: The Court is not prepared to rule that paper out now. Whether it will have effect, or what effect it will have, will depend upon the case as it is developed.

MR. GRAY: I object to its production.

THE COURT: You wish to note an exception?

MR. GRAY: Yes, sir.

THE COURT: Let the exception be noted as to the production of the paper.

(Exception noted for defendant.)

Q. Will you produce a paper purporting to be a letter dated November nineteenth, 1875, from the Treasury Department, signed "A. V. Holmes, Assistant Secretary"?

MR. GRAY: We object to the production of the paper for the same reasons as heretofore stated.

THE COURT: Upon the ground that they were not compelled to produce them?

MR. GRAY: No, sir; not that he was not compelled to produce them, but as I stated to your Honor before, these papers, unless we produce them in this case as evidence, are immaterial and irrelevant, and they cannot be criticised by my friend in the presenting of his case and proof. They are in the nature of an affirmative defense; until we have based a defense upon them they are absolutely immaterial and irrelevant.

THE COURT: Wouldn't your objection be to the offer of them in evidence?

MR. GRAY: I thought it safe and proper, may it please your Honor, to object to their production.

THE COURT: You object to the production. I never heard of exception to the production of a paper, but I have heard of exception to the receiving of them in evidence.

MR. GRAY: I wish it to appear upon the record that we have brought these papers here in response to a *duces tecum*, and produce them under protest, and objected to being compelled to produce them.

MR. NIELDS: I insist upon their production and subsequent use as evidence of non-payment, being fabricated and forged papers.

THE COURT: The witness has produced the papers.

MR. GRAY: He had put him on the stand and I objected when Mr. Nields asked him to produce them.

THE COURT: What is the nature of the objection?

MR. GRAY: I do not know whether you can say technically he has produced it, but I certainly make my objection for what it is worth, and did so as soon as Mr. Nields asked him to produce it. I objected to his production of it. I suppose your Honor will overrule me as you did before, but I will simply ask for an exception.

THE COURT: I fail to appreciate the exact point you wish to cover. If you object to the thing which is produced as being irrelevant and immaterial, the Court can understand that. Is that the point?

MR. GRAY: Yes, sir.

THE COURT: You have not made that objections as yet.

MR. GRAY: I beg your Honor's pardon. I thought that was exactly what I did state. That is what I intended to say.

THE COURT: I understood you to say that you objected to the production of the paper.

MR. GRAY: I do not mean to say you have not the right to order us to bring our books here now and prove the entries, or anything of that kind, but I mean to say that there are certain things that are asked for and are disclosed by the description in the *duces tecum*, that there are certain papers which are part of our affirmative defense, and until they are used in our affirmative defense, as evidence, they are immaterial and irrelevant.

THE COURT: The Court cannot sustain that contention.

MR. GRAY: Then I ask for an exception.

THE COURT: Let the exception be noted.

(Exception noted for defendant.)

Q. Will you produce a paper purporting to be a letter of the Treasury Department, dated November twenty-seventh, 1877, signed "Charles W. Hayes, Assistant Secretary"?

MR. GRAY: I object.

THE COURT: You propose to show that that letter is material to your case in negating the idea of payment?

MR. NIELDS: Undoubtedly.

THE COURT: The Court will allow it to go in.

MR. GRAY: In order that it may be known that this paper is brought here under protest, I desire to protest against its production and object to it as being immaterial and irrelevant in the putting in of the Government's case.

THE COURT: Let the protest be noted.

(Protest noted for defendant.)

MR. NIELDS: I simply want to say that if the Department had been paid the debt there could be no occasion for fabricating a receipt. As evidence

of the non-payment I ask for the production of these papers.

Q. Will you produce a paper purporting to be a sight draft dated November twenty-seventh, 1877, signed "Charles W. Hayes"?

MR. GRAY: I enter my protest against the production of this paper, for the same reasons heretofore stated.

THE COURT: Let the protest be noted.

(Protest noted for defendant.)

(Paper produced by witness.)

Q. I had already asked for the production of the letter?

A. Yes, sir.

Q. Mr. Hall I will ask for the production of a slip of paper bearing the endorsement "Dividend, June, 1871; no voucher yet found."

MR. GRAY: I object for the same reasons heretofore stated; and also for the further reason that it is not pertinent to the issues in this case—any papers in connection with the dividends of 1871. We are trying here a case on the dividends of 1873, 1875 and 1876, and those are the only dividends the Government say they did not get. Now, he is asking us to produce a slip of paper relating to a dividend in 1871, concerning which there is no controversy before this Court.

THE COURT: The Court cannot understand, and it would be improper for the Court to say just how that may be material on this question, but the Court can readily conceive that the course of this company in regularly paying the other dividends and in omitting these three, might have some significance.

MR. GRAY: I ask that an exception be noted.

THE COURT: Exception noted for the defendant.

(Exception noted for the defendant.)

MR. C. BIDDLE: Nothing has been offered in evidence.

THE COURT: No. Mr. Nields has not offered anything in evidence.

(At 12.57 o'clock P. M. a recess was taken until 2.00 o'clock P. M. same day.)

2.00 o'clock P. M. Same day.

WALTER HALL.

WALTER HALL, a witness on behalf of the United States again taking the stand, his direct examination is resumed as follows:

By MR. NIELDS:

Q. At my request you have produced the draft dated October twenty-sixth, 1874, the letter dated November nineteenth, 1875, the paper purporting to be a draft of November twenty-seventh, 1877, and a copy of the letter. They were all taken from the files of your company?

A. They were.

MR. NIELDS: Mr. Hall, there have been certain statements made in regard to the character of these papers, and the Government desires to disclaim that you had any knowledge of any kind indicating the character of these papers, or that any officer of the Chesapeake and Delaware Canal Company, save Leslie and Wilson, knew of the fraudulent character.

CROSS-EXAMINATION.

By MR. C. BIDDLE:

XQ. Mr. Hall, you were asked where you found these papers. I see one of the papers produced is "Dividend, June, 1871." I see that is a paper with-

out a signature. Do you know anything about that paper at all?

A. I have no recollection of that paper at all. I do not know anything about it.

XQ. You do not know anything about it?

A. No, sir.

XQ. When you say you found it in the files of the company, where did you actually find that piece of paper?

A. As custodian of the papers of the company, it was among the papers and books of the company.

XQ. You found it among the books of the company?

A. I did.

XQ. You don't know in whose handwriting that is, or anything about it, do you?

A. I do not.

XQ. These other papers which have been produced, letters and drafts, you didn't find those among the receipts for dividends did you?

A. We have no loose receipts for dividends.

XQ. You never had any loose receipts for dividends at all?

A. No, sir.

XQ. Where are your dividend receipts entered?

A. All in the dividend book here.

XQ. When you say you found these papers in the files, did you mean to say you found these papers among the books and papers in your company's safes?

A. I do.

XQ. With all the other papers?

A. Yes, sir.

XQ. But not with the receipts?

A. No, sir.

XQ. For dividends?

A. No, sir.

RE-DIRECT EXAMINATION.

By MR. NIELDS:

RQ. Were not these papers along with the drafts that had been received by the defendant company for the other fourteen dividends?

A. They were when I found them, yes, sir.

RQ. They were when you found them?

A. Yes, sir.

MICHAEL J. O'REILLY.

MICHAEL J. O'REILLY, a witness having been previously sworn and now recalled on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Did you visit the office of the Chesapeake and Delaware Canal Company at any time?

A. I did.

Q. Under what circumstances?

A. By direction of the Secretary of the Treasury.

Q. For what purpose?

A. To make an examination of the books and papers of the company with a view of ascertaining what evidences of purported payments were in their files as to the dividends declared by the company on the stock owned by the United States.

Q. What papers were shown you and by whom?

MR. C. BIDDLE: We object. He must fix the time this visit was made.

Q. What time was this visit made?

A. I visited the office of the Canal Company in Philadelphia on or about the nineteenth day of May, 1913, in pursuance of the written instructions of the Secretary of the Treasury. I have those instructions with me.

Q. In your pocket?

A. On the chair which I have just left.

Q. What were those instructions?

MR. C. BIDDLE: We object.

Q. Get your instructions and we will see what they were. By whom were the instructions given?

A. By the Secretary of the Treasury.

Q. Mr. McAdoo?

A. William G. McAdoo.

Q. What are those instructions?

A. This paper contains the instructions I received from him.

Q. What were those instructions?

MR. C. BIDDLE: We object.

Q. Pursuant to the instructions of the Secretary of the Treasury, what did you do?

A. I inspected the books and papers of the Chesapeake and Delaware Canal Company at their office in the City of Philadelphia.

Q. Who were present while that inspection was being made?

A. Mr. Walter Hall and another gentleman, I judge an employee of the company, whose name I do not know.

Q. Gibson?

MR. C. BIDDLE: We object.

A. He was a gentleman, and while I do not recall distinctly being introduced to him by name, he was an employee in the office and he was performing duty there.

Q. An elderly person?

A. No, sir; a young man; a middle-aged man. I couldn't say just exactly what his age was.

Q. The one person you remember as being there was who?

A. Mr. Hall. Mr. Hall was the gentleman to whom I presented my instructions and who produced, at my

request, books and papers, as I called for different character of books.

(Handing witness paper writings.)

Q. I hand you those papers and will ask you where did you first see them, and under what circumstances?

THE COURT: Have you identified those papers in your question? How are they marked?

MR. NIELDS: I thought I had asked him. I did not want to lead him in any way.

Q. What are those papers you have in your hand? What do they purport to be?

MR. C. BIDDLE: No. We object to that. He can give the dates if he wants to, to identify them. Mr. Nields can do that in his question, and say, "I hand you paper dated so and so".

Q. I hand you papers dated respectively November twenty-sixth, 1874, November nineteenth, 1875, November twenty-seventh, 1877, two of them, of the last date, and will ask you where you saw those papers first, and under what circumstances?

MR. C. BIDDLE: I object. My objection goes to this position: That here is a gentleman who has testified that he goes there in 1913, and he proposes to give us some information as to what was said to him, or what he said to one of the employees of the company, at that time, long after the presumption of payment had passed, long after any time for admission, if it was an admission, on the part of an employee—an employee of the company making an admission—the evidence itself is inadmissible for the purpose of rebutting a presumption that has arisen by twenty years which have already passed. He is speaking of an interview in 1913, therefore, it is inadmissible.

THE COURT: I do not know that I get clearly the point of your objection. Do you suggest that

an admission made after the lapse of twenty years would not be available?

MR. C. BIDDLE: Yes, sir.

THE COURT: The Court would overrule you then.

MR. C. BIDDLE: I have a decision simply on that point, that after the presumption has arisen the endorsement is that presumption of payment is a receipt, because of the lapse of twenty years after it was due. Therefore, the evidence must be within that period to show that that presumption has not arisen by the twenty years. He is offering evidence as to facts that happened in 1913—that is about thirty-five years after the debt became due. I say he cannot rebut the presumption which arises by the lapse of twenty years from the date it was due; and I object to offering in evidence anything as to what was said or done in 1913.

THE COURT: Is it your contention that any admission, or whatever was said, must be said within the twenty years?

MR. C. BIDDLE: Within the twenty years in which the presumption has arisen.

THE COURT: I do not think the Court could sustain that position, for the simple reason that until the twenty years have elapsed the presumption does not arise.

MR. C. BIDDLE: He is speaking of 1913, long after the twenty years have elapsed.

THE COURT: Yes; precisely, but until the twenty years have elapsed there is no presumption. Therefore, in order to meet the presumption the evidence must relate to a period subsequent to the lapse of twenty years.

MR. C. BIDDLE: No, sir; it must relate to the period within which the presumption is arising,

the twenty years, because at the end of that twenty years the presumption has arisen. So his evidence must relate to that period of time. If your Honor would like to hear some decisions on that point, I have them right here.

(Mr. C. Biddle here continues argument and cites authorities in support of his contention.)

MR. NIELDS: There has been an opinion handed down in this case for the Court's guidance, doubtless, in this trial. The Circuit Court of Appeals for the Third Circuit dealt with this aspect that is now being considered, and held that this presumption of payment in this case was a disputable presumption of fact.

(Mr. Nields continues citing from the opinion by the Circuit Court of Appeals.)

THE COURT: The discrepancy between the former decision here and that particular portion you refer to, was on the broad question to which I felt constrained to apply the language of the Supreme Court, and which the Circuit Court of Appeals did not think had the force attributed by this Court.

(Mr. Nields here cites authorities in support of his contention.)

(Mr. C. Biddle further cites authorities in support of his contention.)

THE COURT: I have not a particle of difficulty on the principle of this thing according to the understanding of the Court. It is overwhelmingly settled that the common law presumption arising from the lapse of twenty years is not a conclusive presumption but a disputable presumption, and before any presumption can exist at all twenty years must have elapsed. Of course, if the presumption arises by reason of the lapse of twenty years and that presumption is not rebutted, then

it operates in the language of the Supreme Court, or whatever Court it was in the existence of a positive bar. Of course, it is a positive bar unless the presumption is rebutted; but that does not affect the question as to how, or in what way you can rebut the same. It is a presumption which may be disputed. It is *prima facie* presumption. It is that by reason of the lapse of twenty years, or inaction, the law presumes, in a disputable sense, that payment has been made, and in a number of the courts it rests upon the principle that it is unnatural and improbable that a man, who is supposed to be actuated by his self-interest, if he has a just claim and knows about it, should remain for twenty years without seeking to put in his pocket what belongs to him. But the presumption does not arise until the twenty years have elapsed. It requires the passage of the twenty years in order that presumption may arise at all. The Court is not prepared to hold—and if it must be held, it will have to be held by some appellate tribunal—that it is impossible, by evidence of admission, after the lapse of the twenty years from the creation, to repel that presumption. I do not recall any case in which the Court held, and, necessarily held, that the clear unqualified admission by the defendant that that money was owing and that it had never been paid, would not be sufficient to repel a presumption; and if so, I cannot conceive upon what principle such a holding would be justified. In other words, if that is the law, it seems to me that what the cases have termed a *prima facie*, or disputable presumption is rendered an absolute and unqualified presumption; and I do not believe that is the law. If I am in error on that point, of course, you have your redress, but it seems to me, as you know, a great many loose things are said in

cases, and in order to determine the force of the point in the case to be decided you have got to take and read the thing with respect to the point to be decided. You have got to take the thing in connection with the matters before the Court that have to be decided on. I cannot conceive of any principle which would exclude evidence which would show, to the satisfaction of the jury that the debt had not been paid. It seems to me it is a matter for the jury. I do not know what force these papers will permit. I do not know what weight the jury will give to them. I am not prepared to go as far as counsel for the defendant now urge. What is your offer? How did this question come up?

MR. C. BIDDLE: By getting the witness to say what occurred at his interview with Mr. Hall in 1913. We object to his making any inquiry as to what occurred at the interview in 1913.

Q. State the circumstances, if any, under which you saw those papers.

MR. C. BIDDLE: Those papers have not been offered in evidence, and I do not know that it is right for the witness to state the circumstances under which he got them.

MR. NIELDS: I have stated to the Court and jury, not once but several times, that the defendant exhibited these papers as evidence of payment and that that fact of exhibition to an agent of the United States is a fact that I now seek to elicit from this witness. Where were they obtained, under what circumstances and from whom. That is my question.

Q. Where were they obtained, under what circumstances and from whom?

MR. C. BIDDLE: I object, seriatim. I object to this question as the witness has stated he knew

nothing about this matter until he went to Philadelphia in 1913. Therefore, his testimony as to what occurred at that time is irrelevant and improper.

A. I hardly recall the words that Mr. Biddle has just stated (having reference to the record read by the stenographer at the request of Mr. Biddle). If they are in the record, I would like to correct them.

By THE COURT:

Q. What words?

A. That I first knew of this matter in 1913.

MR. C. BIDDLE: He has testified as to an interview in 1913.

THE COURT: The objection is overruled.
(Exception noted for defendant.)

A. I first saw this paper, dated October twenty-sixth, 1874, the paper of November nineteenth, 1875, and the two papers of November twenty-seventh, 1877, at the office of the Chesapeake and Delaware Canal Company in the City of Philadelphia, on the nineteenth day of May, 1913, on the occasion of my visit to that office by direction of the Secretary of the Treasury to inspect the books and records in the Canal Company's office. They were handed to me by Mr. Walter Hall, who was Secretary and to whom I presented my letter of instruction, together with other papers representing vouchers for the fourteen dividends paid to the United States, of which the Treasury Department had record.

Q. What then was done?

A. I examined the papers, made notes from them and spoke with Mr. Hall concerning them.

Q. From what place did Mr. Hall, if you know, obtain those papers?

A. I think from the vault.

By MR. C. BIDDLE:

Q. Did you see him take them from the vault?

A. I sat at the desk in the room of the office of

the company and as I requested of him certain books, the character of books describing what I wanted, Mr. Hall would go and get the book and bring it to me. When I asked for the vouchers representing the company's payments of these dividends to the United States, Mr. Hall left me and returned with a package, and among the papers in that package were these four papers.

By MR. NIELDS:

Q. Did you see what other papers were contained in this package?

A. I did.

Q. What were they?

A. I saw the drafts of the Secretary of the Treasury for all of the fourteen dividends except the dividend No. 11 for which there was in place where that should be, a slip of paper.

THE COURT: How were those drafts made? I do not exactly understand.

Q. You have spoken of fourteen dividends evidenced as paid by drafts. Will you state to the Court what those drafts were and how they evidenced payment of the fourteen dividends? Who drew them, or how were they drawn, and to whom were they payable?

MR. C. BIDDLE: These questions are all subject to my objection as being improper and irrelevant.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

MR. GRAY: I make the further objection to that question of immateriality and irrelevancy in this case, that is, concerning any papers that have been found in the company's files concerning their dividends.

THE COURT: The Court overrules that objection and an exception will be granted to this latter objection.

(Exception noted for defendant.)

Q. Will you repeat, so that I may understand exactly, what you asked for?

A. I asked Mr. Hall——

MR. C. BIDDLE: Do you think these conversations which this gentleman had with Mr. Hall——

THE COURT: He has not stated what Mr. Hall said. He said he asked Mr. Hall.

A. (Continuing.) I asked Mr. Hall, in turn, to produce for me the record books of the company, asking him for the stock ledger and the minutes of the meetings of the Proprietors, the cash book of the company, the waste book of the company, and any data that he had concerning the dividends paid by the Chesapeake and Delaware Canal Company to the United States, including any vouchers held by the company as evidence of the payment of said dividends, and in pursuance of my request he produced, in turn, not all at the same time, but just as I desired them, utilizing the space on the desk and table, as I needed them. In turn, I took them in regular order, tracing from one book to another, and made my notes as I proceeded, he furnishing me with each specific character of paper and book, as I desired, in my inspection.

Q. You stated, as I recall, that these particular papers, four in number, were produced in conjunction with other papers?

MR. C. BIDDLE: I object to Mr. Nields' repeating what the witness has said. If he wishes the witness to repeat it over again, let him do it.

A. In response to my request for any vouchers or papers that the company held as evidence of payment of any dividends to the United States——

By MR. BIDDLE:

Q. Are you giving the exact words, or just about what you think you said?

A. Just as I recall the way I would be likely to express it.

Q. In response to a question and demand for vouchers?

A. Yes, sir; I made the demand. In that way Mr. Hall brought to me this bundle of papers among which were these four papers that have been handed to me and which I have identified as first seen by me on the nineteenth of May, on or about the nineteenth of May, 1913.

By MR. NIELDS:

Q. What were these other papers?

A. The other papers were paid drafts drawn by the Secretary of the Treasury upon the Chesapeake and Delaware Canal Company for the dividends declared, that is, declared by the company, dividends No. 1 down to No. 14, with the omission of such draft for the dividend known as No. 11.

Q. Will you answer the inquiry of the Court in regard to the use and character of these drafts for the fourteen dividends?

MR. C. BIDDLE: I think that is going too far.

THE COURT: I should like to understand how these drafts were made. I think it is very material for both sides.

MR. C. BIDDLE: It has been so long ago that I do not consider it of any importance.

MR. NIELDS: The Government regards it of the greatest importance and will seek to enlighten the Court fully.

Q. You have mentioned another paper, I understand?

A. Yes, sir; a slip of paper.

Q. I hand you that paper and will ask you whether or no you recognize that paper?

A. This is the paper that I saw in the files of the Chesapeake and Delaware Canal Company on that occasion.

Q. By whom was it handed to you?

A. By Mr. Hall, together with the other papers connected with these vouchers for the various dividends.

Q. How long a time did you spend at the Canal Company's office examining these vouchers?

A. The entire day. I think I went there about nine o'clock in the morning and Mr. Hall very kindly allowed me to stay at the office that afternoon in order that I might finish my work and be able to take the train for home the same night. So, I think I was there, as I recall it now, until after 5 o'clock.

Q. Did you have occasion to visit the office again?

A. I did, sir.

Q. What was your mission on that occasion?

A. To again inspect those papers representing the vouchers held by the company as their vouchers for payment of these dividends.

Q. When was that?

A. The first day of November, 1913.

MR. C. BIDDLE: They are bringing in here evidence before you of what occurred after this suit was instituted. Their receipts, or whatever receipts they must have had must have arisen before that time

THE COURT: Undoubtedly, but this is a matter of evidence, and not a subject of rights.

Q. What, if anything, was exhibited to you on this occasion, and by whom?

A. The same bundle of papers that I first had handed to me by Mr. Hall in May were again handed to me by Mr. Hall on that date, November first, 1913, and I again examined the papers, and saw there among them the four papers I have just identified, and also the slip of paper. I was accompanied then on that occasion by another gentleman.

Q. By whom?

A. By Mr. A. S. Osborn.

Q. A gentleman here present?

A. Yes, sir; I see Mr. Osborn sitting in the court-room.

NO CROSS-EXAMINATION.

ROBERT H. T. LEIPOLD

ROBERT H. T. LEIPOLD, a witness produced, sworn and examined on behalf of the United States testifies as follows:

By MR. NIELDS:

Q. Were you ever an employee of the United States?

A. Yes, sir.

Q. In what department of the Government?

A. The Treasury Department.

Q. What was your position?

A. When I left there I was Chief of the Division of what was then known as the Independent Treasury, and now known as the Division of Public Monies.

Q. When were you there? Between what years?

A. I was there from 1866 until 1874.

Q. Until 1874?

A. Yes, sir.

(Handing paper to witness.)

Q. Are you able to see this writing?

A. Yes, sir.

Q. I hand you a paper dated October twenty-sixth, 1874, signed, "J. F. Hartley", and will ask you in whose handwriting that is?

A. The writing is in my handwriting.

Q. The writing is in your handwriting?

A. Yes, sir.

Q. When did you leave the Treasury Department?

A. I left it in July, 1874.

Q. In July, 1874?

A. Yes, sir.

Q. You know that is your handwriting?

A. Except the "4" there.

Q. Except the "4"?

A. Yes, sir. I couldn't have put that there.

Q. But in every other respect that is in your handwriting?

A. That is my handwriting, yes, sir.

NO CROSS-EXAMINATION.

MR. NIELDS: I offer in evidence certified copy of the resignation of Mr. R. H. T. Leipold, dated July eighteenth, 1874.

(Certified copy of resignation admitted in evidence without objection, and marked "Government's Exhibit No. 9".)

ROBERT H. T. LEIPOLD.

ROBERT H. T. LEIPOLD, a witness having been previously sworn and now recalled on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. In order to make myself clear, and to make your testimony clear I have recalled you for the purpose of asking a few questions. Were you in the Treasury Department on October twenty-sixth, 1874?

A. No, sir.

Q. Could you have written any such letter dated October twenty-sixth, 1874?

MR. C. BIDDLE: I object. It is a question for the jury to say, after hearing the facts.

THE COURT: Not what he could, but what he did, or what he did not do.

A. I have the acceptance of my resignation in my pocket.

Q. You say on that date you were not in the Treasury Department?

A. I was not.

Q. And that paper is in your handwriting?

A. Yes, sir.

By THE COURT:

Q. How late in 1874 was it that you wrote any letter?

A. In the Treasury Department?

Q. Yes.

A. Not after July first.

Q. You wrote no letter in that Department after July first, 1874?

A. No, sir.

Q. Or draft?

A. A draft?

Q. Yes.

A. No, sir. I couldn't have done it after I left.

NO CROSS-EXAMINATION.

FRANK G. COLLINS.

FRANK G. COLLINS, a witness produced, sworn and examined, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Are you an employee of the United States?

A. I am.

Q. Where?

A. Division of Loans and Currency, Treasury Department, at Washington.

Q. How long have you been there so employed?

A. Since June fifth, 1874.

Q. I hand you a book and will ask you to state what it is.

A. It is a volume of press copies of letters covering the period from September first to October thirty-first, 1871, marked "Loan Branch".

Q. In whose custody is that kept? Where does that particular book belong?

A. That belongs to the Division of Loans and Currency, that is now, but was at that time a division called the "Loan Branch".

Q. Was that particular volume taken from that place?

A. It was.

Q. I will ask you to state whether or no there appears therein a copy of the paper which I hand you, except the figure "4"?

A. It does appear therein.

Q. Exhibit the copy and the book to the jury and explain how you arrive at that conclusion.

MR. GRAY: I object, because it is not in evidence.

MR. NIELDS: I asked the witness if there was a copy of that paper, which I handed him, in that book, and he said that there is.

THE COURT: Is that a manuscript letter?

MR. NIELDS: Yes, sir, in toto.

THE COURT: Do you want to show the similarity between them?

MR. NIELDS: Yes, sir.

THE COURT: What is your objection, Mr. Gray?

MR. GRAY: My objection is that neither of these papers are in evidence and the jury has no right to inspect them.

THE COURT: You haven't offered them in evidence.

MR. NIELDS: I offer now in evidence this draft dated October twenty-sixth, 1874, and this copy book.

THE COURT: For the purpose of comparison?

MR. GRAY: I object to their being offered for the purpose of comparison, or for any other purpose whatsoever. This letter book which he is talking about purports to contain a copy of a draft dated in 1871. It is something that has nothing to do with this case. It is the Government's copy, a letter press copy of a draft of 1871.

THE COURT: Suppose that the original—and when I say original, I mean the one that was written on—suppose that is an exact copy, or that there is an exact identity between that paper and the letter press copy, such an identity that on the basis of chance there wouldn't be one chance in a million that it didn't represent the same thing. I understand that the position taken by the attorney for the United States is as bearing upon this question of fraud to which he alluded; that is to say; that this paper was fraudulently changed for some purpose or other?

MR. NIELDS: Yes, sir.

MR. GRAY: That is exactly one of the things I protest against; that is, you say, there might not be more than one chance in a million, but we are here defending this case, and we claim that the United States should offer its proper evidence and not chance. The element of chance has got to be eliminated from their evidence. As far as this other paper is concerned, I objected to that, and its production here. I protested against its production for the reasons I stated this morning, and I do not think it is necessary for me to state them

again, at length now. It is a part of our affirmative defense, if it is to be taken as an evidence of payment, and if it is not introduced as evidence of payment, then it is absolutely immaterial.

THE COURT: If it is not introduced as evidence of non-payment it is immaterial?

MR. GRAY: No, because the paper will speak for itself, and it certainly, on its face, does not purport or indicate to be evidence of non-payment; but I say, on its face, as the paper reads, it purports to be evidence of payment. That is a part of our affirmative defense, and until we introduce that paper as part of our evidence of payment, it is absolutely immaterial in this case. We can have all the scratches and scrawls and memorandums in our files, that we want; we can keep letters, and papers and documents, we can keep what we chose in our files, but until we offer them as evidence in our defense under the plea of payment, they are immaterial and irrelevant.

THE COURT: Suppose you should not offer them at all?

MR. GRAY: Then we certainly have not suggested them as evidence of payment.

THE COURT: Would that exclude the Government from showing, if it be material? Of course, all this would have to be followed up, but if it be material that that was a false change in date for certain purposes, then the Government, surely, could not be, if it is a material and proper thing excluded merely because of an omission on your part to bring it forward by way of defense.

MR. GRAY: I fail to see what it has to do with this case at all unless it is produced by us.

THE COURT: The Court cannot agree with you on that.

MR. GRAY: Then we ask for an exception.

THE COURT: Let the exception be noted.
(Exception noted for defendant.)

Q. You have stated that there is a copy of that paper?

A. I have.

Q. Show to the jury why you make that statement.

MR. GRAY: Does your Honor admit both of these papers in evidence?

THE COURT: Yes.

MR. GRAY: Then I ask for an exception to both of them.

THE COURT: Let the exception be noted.
(Exception noted for defendant.)

A. Gentlemen, if you read that carefully, comparing that first copy with that original you will see that it is exactly word for word, that there are the same number of lines, the same amount and everything, and if you will observe that little scratch there, of the pen, you will have——

MR. BIDDLE: I object.

MR. NIELDS: The jury suggested that the original be placed underneath the copy.

THE COURT: The jury could do that.

Q. For what year is this a press copy?

A. September first to October thirty-first, 1871, inclusive, "Loan Branch".

MR. NIELDS: I offer in evidence these various papers.

MR. GRAY: We object.

MR. C. BIDDLE: I have already given the reasons for our objection to their admission as being irrelevant and improper.

THE COURT: The Court admits them on the undertaking of the attorney for the United States to follow them up with other proof.

(Exception noted for defendant.)

(The paper writings are admitted in evidence

subject to the objection and marked respectively, letter of November nineteenth, 1875, "Government's Exhibit No. 11"; letter of October twenty-sixth, 1874, "Government's Exhibit No. 12"; draft of November twenty-seventh, 1877, "Government's Exhibit No. 13"; and letter of November twenty-seventh, 1877, "Government's Exhibit No. 14"; also slip of paper, "Dividend June, 1871", "Government' Exhibit No. 15".)

MR. NIELDS: I also offer in evidence this copy book for 1871, pertaining only to the one page.

MR. C. BIDDLE: I object to its admission in evidence.

MR. NIELDS: Then I offer the whole thing, including this particular letter; as well as all the surrounding papers mentioned, showing that this is a letter press copy book of 1871, and the contiguous pages, those that precede and follow that date.

THE COURT: For the purpose of showing that the book relates to the drafts?

MR. NIELDS: That this is a copy of a paper dated October twenty-sixth, 1874; in fact, copied in a copy book which covered letters only from October, 1871. The pertinency of this evidence, if the Court please, is to establish that this is the draft of 1871 altered by the change in the figure "1" to "4".

THE COURT: You want to show that that all relates to 1871 and not to 1874?

MR. GRAY: There has been no denial on our part that that letter in that book was dated 1871, and he should have waited until we denied that before he attempted to offer the whole book in evidence as corroboration.

THE COURT: Do you admit that that book is restricted to letters, or drafts, or whatever they may be, of 1871?

MR. C. BIDDLE: That the book is restricted, certainly. We want him to confine himself to this one page, because we do not want to cumber our record with this whole thing.

THE COURT: It is admitted by counsel that that book relates exclusively to 1871 transactions, and you retain that book merely for the purpose of examination with respect to that particular page.

MR. NIELDS: Yes, sir; and for argument to the jury when I have occasion to argue this matter before the jury.

THE COURT: Based on the fact that all the contents relate to 1871?

MR. GRAY: That is admitted, but so far as any other page in that book, which is shown to be, in any way, irrelevant or immaterial, I ask, with the exception of that page, that the book be sealed before being admitted in evidence.

THE COURT: Is there a clear understanding in regard to that matter as to all the rest being sealed; I mean, all other portions with the exception of that page?

MR. GRAY: That is our intention.

THE COURT: You have no objection to that?

MR. NIELDS: I have no objection.

(Page in book admitted in evidence and marked, "Government's Exhibit No. 10".)

ALBERT S. OSBORN.

ALBERT S. OSBORN, a witness produced, sworn and examined, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Where do you reside?

A. Mount Clair, one of the suburbs of New York City.

Q. What is your business?

A. Examiner of questioned, suspected and disputed documents.

Q. How long have you been engaged in the examination of documents?

A. Upwards of twenty-five years.

Q. You have testified in this court before, have you not?

A. Yes.

Q. On several occasions?

A. Twice.

MR. C. BIDDLE: I will admit that Mr. Osborn is an expert.

Q. As the question of credibility is for the Court, I will ask you whether or no, Mr. Wigmore, who has written a standard work on evidence, has embodied some of your researches?

MR. C. BIDDLE: I will admit that the witness is an able, honest and efficient man, probably the best man in his profession, in the United States.

Q. I will ask you whether you have had occasion to see the papers that I have now handed you?

A. I have.

Q. I have handed you a paper dated October twenty-sixth, 1874, a paper dated November nineteenth, 1875, a paper dated November twenty-seventh, 1877, and another paper dated November twenty-seventh, 1877, and will ask you whether or no you have seen those papers for examination?

A. I have.

Q. And also this paper which I now hand you?

A. Yes.

Q. Mr. Osborn I hand you Government's Exhibits numbered 11, 12, 13, 14 and 15, being respectively papers dated October twenty-sixth, 1874, November nineteenth, 1875, November twenty-seventh, 1877, and June, 1871, and will ask you whether or no you have seen those papers before?

A. I have.

Q. Where?

A. In the office of the Chesapeake and Delaware Canal Company, in Philadelphia.

Q. Under what circumstances?

A. I went there to examine them in November, 1913, and May, 1914.

Q. Whom did you find there at the office of the Chesapeake and Delaware Canal Company?

A. Mr. Hall, the Secretary and another gentleman, whose name I do not remember.

Q. For what did you ask?

A. Papers relating to the claim of the United States, or, rather, the first time I was there—may I correct that?

Q. Certainly.

A. Mr. O'Reilly was with me and made the request regarding these various papers. The second time I was there I was there alone.

Q. From where were these papers obtained if you know?

A. From the safe or vault.

Q. Were there other papers accompanying them when they were produced?

A. Yes, sir.

Q. What were those other papers, if you know?

A. Papers relating to the payment of dividends to the United States.

Q. By whom were they handed to you?

A. Mr. Hall.

Q. By Mr. Hall?

A. Yes, sir.

Q. What, if any, examination did you make of those papers?

A. I examined all of them with the view of determining whether they were genuine papers, or not.

Q. What did you do in making that examination?

MR. GRAY: The witness has stated the purpose of his examination, and we object to his testifying further as to the examination at that time, on the ground which Mr. Biddle stated this morning when the papers were first brought out by Mr. O'Reilly to be introduced.

THE COURT: The objection is overruled.
(Exception noted for defendant.)

A. I examined the papers in all of the ways that I know of in connection with investigations of this character.

Q. What particular methods did you use, for example, in investigating the paper which is marked "Government's Exhibit No. 12"?

A. I examined Exhibit No. 12 the same as all the other papers for any evidence in the paper itself that might indicate the document was not a genuine document. The examination of this particular paper disclosed that on the back where the document was filed, that is, the filing mark, "United States, June, 1873", that there had been an erasure upon the document, a chemical erasure. There is a slight stain upon the back, which, in my opinion, indicates that there was a chemical erasure. After making that discovery I examined the front of the paper throughout with a microscope for the purpose of determining if any changes had been made in it. My examination disclosed, when I examined the date "October twenty-sixth, 1874," as it now reads, that the "1874" had been, I thought changed. That is an examination of it with the microscope and by transmitted light showed a difference between what now appears to be the first stroke of the "4" and the other two strokes.

Q. What further tests did you make by photographing, or otherwise, of that?

A. I afterwards photographed the date by transmitted light under magnification. This photograph

was made by lighting the document from the back side of the paper, the reverse side so that the transmission of light through the paper determines the relation of the ink on the paper, and the character of the ink and its relation to the paper, and discloses such differences as may exist in the degree with which the various parts of a writing will transmit light, and this examination in the camera, and afterwards shows in the photograph, showed, that is, in my opinion it showed, that the first stroke of the "4" had been wet by a process of copying; that is, the letter itself shows, in my opinion, that it had been copied by a letter press water copying process. This first stroke of the "4" showed the condition of an ink line after it has been wet in which the ink is more firmly imbedded in the paper, and there is a slight unevenness in the edges of the line. The last two strokes of the "4" in my opinion, as disclosed by a transmitted light examination, and by the photographic image as seen in the camera itself and as reproduced on the photograph, show, unmistakably, the distinctive difference between the first stroke of this "4" and the other two strokes, showing, in my opinion, that the other two strokes were, unmistakably added after the document had been copied with a different ink; that is, an ink I mean, that shows a different appearance under transmitted light. That is, it is different. I do not say that the composition is different, but it is different in its appearance entirely, because one of the strokes, in my opinion, was wet from the copying process, and the other two strokes were not.

Q. Did you make a photographic test of that?

A. I did.

Q. Have you those photographs with you?

A. I have.

Q. Will you state to the Court and jury just what you did to obtain that result?

MR. C. BIDDLE: I want to make a general ob-

jection to the testimony of this witness, on the ground that the whole testimony is irrelevant and improper. I believe your Honor has admitted it under exception.

THE COURT: Yes.

A. I did make such photograph.

Q. Will you explain to the jury what you did, so they can see what you did?

MR. NIELDS: I offer this photograph in evidence, which has just been produced by the witness.

MR. GRAY: I object for the same reason heretofore stated.

THE COURT: Is there any objection to it as a photograph?

MR. GRAY: No, sir.

THE COURT: Then the objection is no good.

MR. GRAY: I ask for an exception.

THE COURT: Note the exception.

(Photograph admitted in evidence, subject to the objection and marked "Government's Exhibit No. 16".)

Q. Will you explain the photograph, if any, which you made of this date?

A. This photograph which I hold in my hand, marked, "Government's Exhibit No. 16", is the photograph which I made at this time, this second time that I examined these papers. These are two photographs of the same date, the abbreviation "th" following the figures "26" and the figures "1874", as it reads. As I have already stated, this photograph was made under enlargement; that is, this was a larger enlargement on the negative in the camera, not an enlargement from the small negative, but this image, as it appears on this photograph was projected on the two ground glasses of the camera and the plate inserted and exposure made, so that the print we have here is made

directly from the image as projected on the ground glass and glass of the plate when exposure was made in the camera itself. By this method of light it is possible to measure the quality and thickness and character of the ink itself on the document; that is, the original shows those strokes, all of them, as black, and by reflected light, even under enlargement, they would appear very much alike, but this process of photography actually measures the thickness of the ink film and its character and its ability, particularly to transmit light; and in my opinion the photographs, one of which is slightly enlarged more than the other, and I believe about ten to twelve diameters—I can tell by measuring it—I have forgotten which; that is, it is really one hundred or one hundred and twenty times the area on the original. In my opinion the photograph shows exactly what appears in the original when it is examined under magnification by transmitted light. This is simply the enlargement in permanent form. The distinctive difference in the appearance of ink, in relation to the line and also the width, is different; the edges of the stroke are different; the whole character, in my opinion, shows unmistakably, that the last two strokes of the “4” were not made when the first stroke of the “4” as it now appears, was made.

By A JURYMAN:

Q. What do you call the first stroke, and what do you call the last two?

A. I call the first stroke of the “4” the one at the left. I mean the first one in sequence, as you read from the left. I mean the first stroke, in my opinion, was not made at the same time the last two strokes were made—the first stroke which was a “1”.

By THE COURT:

Q. Point out to the Court what you mean by the first stroke on that photograph.

A. My reference to the first stroke, was the stroke at the left which was, really, the original "1". What I referred to as the first stroke is what originally, in my opinion, was the figure "1".

Q. That is the stroke next to the "7"?

A. Next to the "7", yes, sir.

By MR. GRAY:

Q. It is the left-hand perpendicular stroke?

A. Yes, sir; it is a slanting stroke, a stroke to the left.

By MR. C. BIDDLE:

Q. The first stroke was the stroke to the left of the "4"?

A. Yes, sir. In my opinion, it was the "1". (The witness here explains the photograph to jury.) The erasure I referred to was not on the face of the document at all, that is, the erasure on the face of the document in the amount column. The erasure that attracted my attention, was one on the back, in the filing mark. That first attracted my attention and after that I examined the face of the document. This additional stroke, in order to make the "4" out of the "1" does not require any erasure at all.

By THE COURT:

Q. I understood one of the jurors drew your attention, or attempted to draw your attention, to the fact that what you determined as the first stroke was so short as not to correspond with the remainder of the figures of the date. Am I right?

A. Yes.

Q. And the suggestion, as put by way of inquiry, was, whether or not acid was used to shorten what may have been the stroke which would not correspond with the rest of the figures?

A. No, sir; I think not. I think there was no other erasure at all at that point.

By MR. NIELDS:

Q. Where was the chemical used?

A. In changing the filing mark on the back of the document.

Q. On the back of the document?

A. Yes, sir.

A JURYMAN: My inquiry was in relation to the copying of this document, as to whether it was copied in that bound book after the papers or pages were bound, or previous to binding in that book.

(The further examination of this witness is suspended for the present.)

MICHAEL J. O'REILLY.

MICHAEL J. O'REILLY, a witness having been previously sworn and now recalled on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. When are these letters copied in this book, if you know?

A. Always on the day of the letter being written, and they are bound together and held and then bound up in periods. Sometimes a whole year's letters will be bound up in one book.

By A JURYMAN:

Q. And then you copy these on what?

A. On loose sheets.

Q. On loose sheets?

A. Yes, sir.

ALBERT S. OSBORN.

ALBERT S. OSBORN, a witness on behalf of the United States, again taking the stand, his direct examination is resumed as follows:

By MR. NIELDS:

Q. I will ask you as an expert whether or no this copy is a copy of the paper, or draft, marked, "Government's Exhibit No. 12", after examination, and if not, in what particular it is not?

A. In my opinion, it is a copy of it with the exception of that figure "4", as the original now appears; that is, the date "1874", as it appears on the original, and the copy is "1871".

Q. How do you come to that conclusion that they are identical?

A. In my opinion this shows all of the little accidental things in writing of this character, that is, in manuscript writing, the matter of shading and accidental variations in letters, and everything. That is, it is a fac simile.

Q. Are they all reproduced in that copy?

A. Yes.

Q. And as to the draft itself, I will ask you what, in your opinion, was the original date of that draft?

A. October twenty-sixth, 1871.

Q. Mr. Osborn, having made this investigation, did you make any further inquiry of Mr. Hall, or any one else connected with the Chesapeake and Delaware Canal Company?

A. Do you mean relating to their papers?

Q. Relating to the draft of 1871, or anything?

A. I made the suggestion—

MR. C. BIDDLE: I object to conversations. As I understand Mr. Osborn, he went there and asked them to let him see all their books and papers, and they gave him all these things prepared for this case.

By MR. C. BIDDLE:

Q. That is about the whole matter, isn't it?

A. I do not understand that question.

(Question withdrawn.)

By MR. NIELDS:

Q. Have you ever seen this paper which is marked "Government's Exhibit No. 15"?

A. That is, that memorandum?

Q. Yes.

A. Yes, sir.

Q. Under what circumstances did you first see that?

A. This paper was brought to me with the other papers in this collection of papers relating to the dividends paid to the United States.

By THE COURT:

Q. By whom?

A. By the Chesapeake and Delaware Canal Company, at their office in Philadelphia.

Q. By whom brought to you?

A. By Mr. Hall.

By MR. NIELDS:

Q. Did you personally make investigation as to a draft dated 1871, in the files?

A. Yes. That is, this memorandum. I observed that there was no draft of 1871. This memorandum called my attention to that fact that the voucher of 1871 was missing.

Q. So that the draft of 1871 was not there?

A. No, sir.

By MR. C. BIDDLE:

Q. At least you didn't see it?

A. Yes, sir; I did see it afterwards. I discovered the one marked "1874".

Q. You didn't see any other?

A. No, sir.

By MR. NIELDS:

Q. Did you ask for it?

A. Do you mean 1871?

Q. Yes.

A. I don't know that I specifically asked for it. No. I took this voucher as an indication that it was not there. I was not asked to investigate that question.

Q. Mr. Osborn, I will ask you whether or no you have ever seen the two papers, marked respectively, "Government's Exhibit No. 13" and "Government's Exhibit No. 14", before, and if so, where and under what circumstances?

A. Yes, sir. I examined these papers at the same time.

Q. Where did you find those papers?

A. With the others in this same group I have already described.

Q. What investigation did you make of those papers, Mr. Osborn?

A. I examined them in various ways, the same as this other paper, examined the paper and the print and the handwriting and everything that suggested itself to me as a means of finding out anything about them.

(At 4.20 o'clock P. M. adjournment was had until Wednesday, January fifth, 1916, eleven o'clock A. M.)

Wilmington, Delaware, January 5, 1916.

11 o'clock A. M.

ALBERT S. OSBORN.

ALBERT S. OSBORN, a witness on behalf of the Government, again taking the stand, his examination is continued as follows:

By MR. NIELDS:

Q. When the Court adjourned yesterday, I believe you were examining Government's Exhibits Nos. 13

and 14. I now hand you in connection with those "Government's Exhibit No. 11", being what purports to be two letters and a draft dated in 1875 and 1877, and I will ask you what examinations you made with reference to those three papers, and what observation you made with reference to them?

MR. GRAY: May we enter an objection to his answers concerning these papers on the same grounds we objected to the first paper yesterday afternoon? The witness has stated that these papers were examined in 1913 and 1914—in November, 1913, and in November, 1914. I object to the examination of the witness and the exhibition of the papers to him at that time for the reasons stated by Mr. Biddle yesterday.

THE COURT: The objection is overruled, as this is a matter relating to evidence in the case and not a subject of any right.

(Exception noted for defendant.)

A. I examined the papers throughout, including the printed letter heading.

Q. What is the letter heading?

A. The letter heading is the words "Treasury Department" with a dotted line under them.

Q. Does that appear on each of those papers?

A. It does.

Q. What was the result of that examination?

A. The result of that examination was, that, in my opinion, the letter heading printings are of a crude and unfinished, or clumsy, character, and not uniform with each other.

Q. Will you point out specifically that crude and amateurish character?

A. On the letters of November nineteenth, and the letter of the twenty-seventh, marked "Exhibit No. 14", the "Treasury Department" line and the date line run parallel with the ruled line to the edge of the paper and they are not inked uniformly, and are printed

slightly to the left of the middle of the sheet and not uniform in that particular, with Exhibit No. 13, which is printed parallel and practically in the middle of the sheet. The inking and the general character of the print, in my opinion, shows an unfinished and crude appearance.

Q. Mr. Osborn, with reference to Exhibit No. 13, did you make any further examination and investigation of that paper?

A. I did.

Q. Which purports to be a draft dated 1877?

A. I did.

Q. What observation and investigation did you make of that?

A. I made an examination of the endorsement on the back of the paper of the name "George Eyster".

Q. And what did you do in pursuance of that investigation?

A. I examined this signature in comparison with other signatures of George Eyster in the papers at the Chesapeake and Delaware Canal Company's office in Philadelphia, and afterwards other papers bearing his signature, letters and certificates I think they were.

Q. Are these the papers which you examined, or with which you made that comparison of signature?

A. Yes.

(The further examination of this witness is suspended for the present.)

MICHAEL J. O'REILLY.

MICHAEL J. O'REILLY, a witness having been previously sworn and now recalled, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. You have already stated to the Court and jury your official position with the Government?

A. Yes, sir.

Q. Will you examine these papers and state where they were obtained?

A. These papers which have been handed to me were obtained by me from the files of the office of the Secretary of the United States, Treasury Department.

By MR. GRAY:

Q. Where?

A. At Washington.

By MR. NIELDS:

Q. Where at Washington?

A. At Washington, from the official archives of the Treasury Department. They are part of the papers belonging to the archives of the Department.

Q. What are they in character?

A. They are, in the main, letters transmitted by George Eyster, Assistant Treasurer of the United States at Philadelphia, to the Treasury Department in the course of official business.

Q. Bearing his signature?

A. Bearing his signature.

NO CROSS-EXAMINATION.

IDA HOWGATE.

IDA HOWGATE, a witness produced, sworn and examined, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Miss Howgate, are you an officer of the United States?

A. I am an employee in the Treasury Department at Washington.

Q. How long have you been an employee in the Treasury Department at Washington?

A. Since 1888.

Q. In what Department or division of the Treasury are you employed?

A. Secretary's office, Division of Public Monies.

Q. Are you acquainted with those two boxes?

A. I am.

Q. Which purport to contain miscellaneous certificates of deposit?

A. I am.

Q. Will you state to the Court and jury where these boxes were obtained?

A. From the files of the Treasury Department in the custody of the Division of Public Monies.

Q. What do those boxes contain?

A. Certificates of deposit issued by the Assistant Treasurer at Philadelphia.

Q. Whose signature do they bear?

A. Eyster's.

Q. George Eyster's?

A. George Eyster's.

Q. Will you hand to me such certificates of deposit as bear the signature of George Eyster?

A. Here are three certificates bearing the name of an Assistant Treasurer, C. McKibbin.

Q. Are those earlier than the others you handed me?

A. Yes, sir.

Q. They do not bear the signature of George Eyster?

A. No, sir.

Q. Will you kindly return those to the boxes, or just keep them in your possession for the present?

A. Yes.

Q. These nine papers purport to be certificates of deposit bearing the signature of George Eyster between the dates of May eleventh, 1869, and May ninth, 1873. Will you state where they were obtained, and whether or no they are official documents?

A. They were obtained from the files of the Treasury Department, under the care of the Division of Public Monies.

Q. And they are official documents?

A. They are official documents.

NO CROSS-EXAMINATION.

WALTER HALL.

WALTER HALL, a witness having been previously sworn, and now recalled, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. You were subpoenaed to produce among other papers certain drafts bearing the endorsement of George Eyster. Will you kindly produce such others as you now have in your possession, taken from the custody of the Canal Company?

A. I will.

MR. GRAY: If they are produced for the purpose of comparison of the signature of George Eyster, we have no objection, but if there is any other purpose for which they are now offered, we desire to so know, so that we can make such objection as we may see proper.

MR. NIELDS: The sole purpose, at this stage, is for comparison, and I so offer them in evidence.

MR. GRAY: Then we have no objection.

Q. I numbered them in this subpoena from 12 to 20, inclusive. Is there anything connected with the exhibit itself that would connect them with the numbered papers in the subpoena?

A. There is not.

Q. Have you any others bearing the endorsement of George Eyster?

A. I have not.

NO CROSS-EXAMINATION.

MR. GRAY: For the general purposes of identification, may I ask that it be entered upon the record that the papers produced are the papers asked for in the *duces tecum* numbered 12 to 20, both inclusive?

MR. NIELDS: I ask that the draft dated May tenth, 1869, bearing the endorsement of George Eyster, be marked for identification.

(Paper writing, draft, marked for identification, "Government's Exhibit A" as of this date.)

I ask that the sight draft dated October thirteenth, 1870, bearing the endorsement of George Eyster, be marked for identification.

(Paper writing, sight draft, marked for identification, "Government's Exhibit B", as of this date.)

I ask that the sight draft dated April twenty-sixth, 1870, bearing the endorsement of George Eyster, be marked for identification.

(Paper writing, sight draft, marked for identification, "Government's Exhibit C" as of this date.)

Also that the sight draft dated October sixth, 1869, bearing the endorsement of George Eyster, be marked for identification.

(Paper writing, sight draft, marked for identification, "Government's Exhibit D", as of this date.)

I ask that the sight draft dated April twenty-fourth, 1871, bearing the endorsement of George Eyster be marked for identification.

(Paper writing, sight draft, marked for iden-

tification, "Government's Exhibit E", as of this date.)

I ask that the sight draft dated April thirtieth, 1872, bearing the endorsement of George Eyster, be marked for identification.

(Paper writing, sight draft, marked for identification, "Government's Exhibit F", as of this date.)

I ask that sight draft dated May eighth, 1873, bearing the endorsement "George Eyster" be marked for identification.

(Paper writing, sight draft, marked for identification, "Government's Exhibit G", as of this date.)

I ask that the certificate of deposit, dated May eleventh, 1869, bearing the endorsement "George Eyster", be marked for identification.

(Paper writing, certificate of deposit, marked for identification, "Government's Exhibit H", as of this date.)

I ask that certificate of deposit dated October thirteenth, 1869, bearing the endorsement "George Eyster", be marked for identification.

(Paper writing, certificate of deposit, marked for identification, "Government's Exhibit I", as of this date.)

I ask that certificate of deposit, dated April twenty-seventh, 1870, signed "George Eyster", be marked for identification.

(Paper writing, certificate of deposit, marked for identification, "Government's Exhibit J", as of this date.)

I ask that certificate of deposit, dated October fourteenth, 1870, signed "George Eyster", be marked for identification.

(Paper writing, certificate of deposit, marked for identification, "Government's Exhibit K", as of this date.)

I ask that certificate of deposit, dated April twenty-fifth, 1871, signed "George Eyster", be marked for identification.

(Paper writing, certificate of deposit, marked for identification, "Government's Exhibit L", as of this date.)

I ask that the certificate of deposit, dated October twenty-sixth, 1871, signed "George Eyster", be marked for identification.

(Paper writing, certificate of deposit, marked for identification, "Government's Exhibit M", as of this date.)

I ask that the certificate of deposit dated May first, 1872, signed "George Eyster", be marked for identification.

(Paper writing, certificate of deposit, marked for identification, "Government's Exhibit N", as of this date.)

I ask that the certificate of deposit dated May ninth, 1873, signed, "George Eyster", be marked for identification.

(Paper writing, certificate of deposit, marked for identification, "Government's Exhibit O", as of this date.)

I also ask that the Court mark for identification letter dated October third, 1870, signed "George Eyster".

(Paper writing, letter, marked for identification, "Government's Exhibit P", as of this date.)

I also ask that a letter dated October seventh, 1870, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit Q", as of this date.)

I also ask that a letter dated October seven-teenth, 1870, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit R", as of this date.)

I also ask that a letter dated October seventeenth, 1870, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit S", as of this date.)

I also ask that a letter dated October second, 1871, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit T", as of this date.)

Also that a letter dated October second, 1871, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit U", as of this date.)

I also ask that a letter dated October third, 1871, signed "George Eyster" be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit V" as of this date.)

I also ask that a letter dated October twenty-seventh, 1871, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit W", as of this date.)

I also ask that a letter dated October thirty-first, 1871, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit X", as of this date.)

I also ask that a letter dated December fourth, 1872, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit Y" as of this date.)

I also ask that a letter dated December ninth, 1872, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit Z", as of this date.)

I also ask that a letter dated December sixteenth, 1872, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit AA", as of this date.)

I also ask that a letter dated December seventeenth, 1872, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit BB", as of this date.)

I also ask that a letter dated December sixth, 1873, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit CC", as of this date.)

I also ask that a letter dated December ninth, 1873, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit DD", as of this date.)

I also ask that a letter dated December sixteenth, 1873, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit EE", as of this date.)

I also ask that a letter dated December thirty-first, 1873, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identifi-

cation, "Government's Exhibit FF", as of this date.)

I also ask that a letter dated December first, 1874, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit GG", as of this date.)

I also ask that a letter dated December ninth, 1874, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit HH", as of this date.)

I also ask that a letter dated December twenty-first, 1874, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit II", as of this date.)

I also ask that a letter dated December twenty-ninth, 1874, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit JJ", as of this date.)

I also ask that a letter dated November twenty-seventh, 1875, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit KK", as of this date.)

I also ask that a letter dated December twenty-first, 1875, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit LL", as of this date.)

I also ask that a letter dated December

fifteenth, 1875, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit MM", as of this date.)

I also ask that a letter dated December thirtieth, 1875, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit NN", as of this date.)

I also ask that a letter dated December fifth, 1876, signed "George Eyster" be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit OO", as of this date.)

I also ask that a letter dated December twelfth, 1876, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit PP", as of this date.)

I also ask that a letter dated October fourth, 1877, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit QQ", as of this date.)

I also ask that a letter dated October nineteenth, 1877, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit RR", as of this date.)

I also ask that a letter, dated October twenty-sixth, 1877, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification "Government's Exhibit SS", as of this date.)

I also ask that a letter dated December first 1877, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit TT", as of this date.)

I also ask that a letter dated December twenty-ninth, 1877, signed "George Eyster", be marked for identification.

(Paper writing, letter, marked for identification, "Government's Exhibit UU", as of this date.)

ALBERT S. OSBORN.

ALBERT S. OSBORN, a witness on behalf of the United States, again taking the stand, his examination in chief is continued as follows:

By MR. NIELDS:

Q. Mr. Osborn I hand you a paper purporting to be a draft dated November twenty-seventh, 1877, bearing on the back, the name "George Eyster, Assistant Treasurer, U. S.", and will ask you whether or no that endorsement on the back of that draft which reads, "Pay to the order of George Eyster Esquire Assistant Treasurer of the United States at Philadelphia"—

MR. GRAY: It is unnecessary and improper to read to the jury the body of this paper.

MR. NIELDS: I am not reading the body of any of those papers, which have been marked for identification, to the jury, but I am reading from a paper that has already been offered in evidence.

Q. (Continued.) On this paper, purporting to be a draft of the Government for the dividend of 1876, which I have just read to you, did you examine the en-

dorsement with reference to determining its validity on the back of that paper?

A. I did.

Q. Will you state to this Court and jury just what examination and investigation you made?

A. I made a comparison of it with signatures of George Eyster on various other papers.

Q. Will you examine the papers, including this draft of 1871, which purports to be 1874, and state whether or no those are the papers with which you compared the endorsement "George Eyster" on the back of that paper that the Government says is a fictitious name?

A. I compared the signature, or the alleged signature, on Exhibit No. 13 with all of these signatures of George Eyster appearing upon the various papers that have just been marked in evidence.

Q. You recognize those as the papers with which you made this examination?

A. Yes, sir.

Q. Will you state to the Court and jury just exactly what that examination disclosed as to the character of that endorsement?

A. In my opinion, this is not a genuine signature.

Q. How did you arrive at that conclusion?

A. And not written by the same writer that wrote the standard signatures submitted to me for comparison.

Q. Have you made that comparison, Mr. Osborn?

A. I have.

Q. And you have stated your conclusion to the jury?

A. I have.

Q. What was that conclusion?

A. That the signature on Exhibit No. 13, in my opinion, was not written by the same hand that wrote the various signatures with which I compared it.

Q. How did you arrive at that determination?

A. By a comparison of signatures.

Q. Will you state to the Court and jury how you made that comparison?

A. I compared the signature under examination first with the signatures that were at the Chesapeake and Delaware Canal Company's office, and afterwards with the various other signatures that are marked, of the different dates, and I also made a photographic arrangement of these signatures, in order of dates, these various signatures, from 1869 to 1877. My examination disclosed, in my opinion, a great variation in the signature of George Eyster of the different dates, that is, a change in his signature, which, in my opinion, is particularly significant as having a bearing upon whether the signature is genuine, or not. The signature under investigation dated 1877, or the signatures with which I compared, are dated from 1869 to 1877, and in my opinion, the signature under investigation, which I have said is not written by the same writer that wrote the other signatures, is an imitation of an early signature of George Eyster. That is, I find in the study of handwriting covering this period from 1869 to 1877, an evolution or change, a variation in this signature, which, from my experience and study of the question often is the result of the writing of a man who assumes an official position in a bank, or in places where he frequently writes his name. His writing often changes materially until he acquires an official signature due to the frequent repetition of the act, and also various other causes, which official signature, many times, becomes absolutely illegible, and is a mere scrawl—which is the result in the signature under investigation.

Q. Assuming that George Eyster took office in 1869; do you find that evolution here?

THE COURT: The witness having stated that, according to his experience, there is an evolution, so to speak, in a man's handwriting, particularly a person who occupies an official position in a bank and who is required frequently to write his name, and that these papers covering a period from 1869 up to 1877, the attorney of the United States now assumes that the Assistant Treasurer began to write his name in 1869. It is to verify this statement on the part of the witness, as to the evolution of that handwriting—is that what you are after?

MR. NIELDS: Exactly.

MR. GRAY: We do not know from this witness whether he took the office in 1869. Therefore, the evolution wouldn't have been from 1869.

Q. Assuming that George Eyster took the office of Assistant Treasurer, at Philadelphia, in the year 1869; do you find this progression, or evolution, in his signature from the year 1869 to the year 1877?

A. I do.

Q. Will you explain to the Court and jury just exactly what these consisted in, and how you illustrate it?

A. I took all of the signatures of George Eyster available at the time. I am not sure that this exhibit included all of those signatures, but I am sure that these signatures are all included in these exhibits; that is, that all of the signatures I examined are included in the exhibits I have marked, but some of these papers were not available at the beginning; but I took all the signatures of George Eyster that were available and arranged them in the order of dates; and these are dated. There is a little mark on the photograph showing the date of the signature, beginning with December. The first one is December, 1868, signature of the Assistant Treasurer of the United States; and the

next one is May eleventh, 1869, and so on through. The signatures, I find, cover from 1868 instead of 1869. I thought the first one was 1869.

By MR. GRAY:

Q. Then 1868 was an official signature?

A. This is signed, "Assistant Treasurer of the United States".

By MR. NIELDS:

Q. Assuming that George Eyster took office in the year 1868 or 1869, did this progression, or evolution, in the signature occur up to 1877?

A. It did.

Q. Now proceed with your answer as to what your examination showed. What are these?

A. These are photographs of the various signatures of George Eyster arranged in the order of dates.

MR. NIELDS: I offer in evidence these papers that have been shown to be official documents taken from their proper custody, either in the Canal Company or the Government, and also these photographs. I offer them in evidence for the purpose of comparison.

THE COURT: And only for comparison?

MR. NIELDS: Yes, sir.

THE COURT: Have you any objection (addressing counsel for defendant)?

MR. GRAY: No, sir.

THE COURT: Everything that has been marked for identification, as well as the photographs now produced by the witness are offered in evidence for the purpose of comparison of the signature of George Eyster; is that the idea?

MR. NIELDS: Yes, sir; that is my tender.

(The said paper writings are admitted in evidence and marked respectively Government's Exhibits Nos. 17 to 63, both inclusive.)

MR. NIELDS: I ask that this photograph be marked being tendered as an exhibit in the case. Your Honor has admitted that photograph in evidence for the purpose of comparison, and I now ask that it be marked.

(Photograph marked "Government's Exhibit Photograph of Signature No. 1" as of this date.)

I ask that this photograph, which has been admitted in evidence, be marked.

(Photograph marked "Government's Exhibit, Photograph of Signatures No. 2" as of this date.)

Q. Will you come down here within the sight of the jury, as well as the Court, and explain just exactly how these photographs were made, of what they are photographs, and what, if anything, they explain or demonstrate?

A. The signature under investigation, the one on Exhibit No. 13, is the one that appears upon this. This is the original paper, the original document, the one under investigation.

(Witness here explains photographs to the jury.)

If we take the first signature which appears upon this photograph, that is the signature of 1868, of George Eyster, this top one—I mean, take that signature and put it at once with a signature of 1877, we see at once the contrast in the signature. For instance, the last one here upon this paper is December twenty-ninth, 1877, and then there are those of December first, 1877, October twenty-sixth, 1877, October twenty-first, 1877, and then the one in dispute is put in this position, chronologically; and preceding it is one of December twelfth, 1876, and one of December fifth, 1876, and one of December thirtieth, 1875. These signatures appear before and after the disputed one.

This is the one in dispute. That is this signature put in this position in an enlarged form, enlarged to the same degree as the others are; and these last signatures, four for example, and the one involved as a disputed signature, illustrate what I have described as the peculiar development of this handwriting. Many of these signatures would be entirely illegible. The first letter is a freak letter. I never saw it before in any kind of handwriting. He had made the pen go around six or seven times in making the "G".

Q. That is in the 1877 signature?

A. Yes, sir. The point is this: If this disputed signature was made in 1868, it is perfectly apparent how much more nearly alike the genuine signature it is. There are other difficulties in the signature however. The signature has one very significant thing and that is the retouching; in my opinion; that is retouching in which a stroke unnecessary to the legibility has been added to the signature. That is the retouching, or over writing of the signature may indicate genuineness or lack of genuineness. If it was apparently due to the failure of pen or ink an over writing would be rather an indication of genuineness rather than the opposite; but if a stroke is added which is not necessary at all to the legibility of it or to the completion of it as a signature but is made for the purpose that is, apparently for the purpose of making it conform to something else, than that addition is significant as indicating the consciousness of the operation of writing. Of course, the writing of a signature is automatic, almost an unconscious thing. A man doesn't think about it. He writes it. In the disputed signature of Eyster, in the first place, the disputed signature might have been a little blotted after it was written. There is a re-touching in the middle, on the "s" of that word "Eyster", after it was blotted—may be

done to make it appear that it was written continuously, which is the way in which the genuine signatures are written, written without letting the pen up. There was an interruption and stoppage, in my opinion, because in the two strokes one is wider than the other, showing that it was not a continuing stroke, and this stroke was put in distinctly blacker, indicating that it was put in, and not made continuously. That can be very easily seen in the scrawl on the name, and the difference in color can be seen, the blotting, I mean. There are numerous other things about this signature. In the first place, the "G", is made like a capital "O", around from the top of the stroke and goes back to the left like an "O". The "Y" goes around the other way, the reverse way. In my opinion this disputed signature was first made beginning this way (illustrating). That is just the opposite way from the way it was made by George Eyster; and this flourishing is a separate and detached thing, which was put in afterwards, and not part of this peculiar swing motion in the writing of the signature; but the top of the signature, which is the stroke, you see begins and goes back slowly to the left with a little hook, and then around to the right and down. There are some disconnections in the signature. That is, I mean by disconnections that there is one at the top of the "y". One of the jurymen has asked for a magnifying glass so I produce one.

(Witness here produces magnifying glass to the jury and further explains the photographs to the jury.)

MR. NIELDS: Will you explain to the Court the significance of the photographs?

THE WITNESS: Yes, sir.

(The witness here explains to the Court the significance of the photographs.)

CROSS-EXAMINATION.

By MR. C. BIDDLE:

XQ. You were employed by the Government as their expert in this case, were you not?

A. Yes. I was employed to make an investigation for them.

XQ. To make an investigation?

A. Yes, sir.

XQ. Do you remember when that was, about what year?

A. It was, of course, before November, 1913. I do not remember just when. I think some weeks before that time.

XQ. And then as I understand it you and Mr. O'Reilly, the witness who has already been called, went to the office of the Chesapeake and Delaware Canal Company for the purpose of looking over their records and papers so that you might be prepared to testify in this case?

A. No, sir; not exactly that, because I didn't know then whether I would testify or not. I went there to make an investigation.

XQ. To examine into the facts in this case so as to be prepared in case they wanted them, which was perfectly proper?

A. To be prepared, in case my finding agreed with the theory that they were pursuing. I was not engaged then to testify. I was engaged to investigate.

XQ. When you went there with Mr. O'Reilly you asked for all the records relating to the matter, the books and papers, and they were at once freely given you?

A. No, sir; they were not.

XQ. They called me up first and I said, "Give them to him." I will modify that question to that extent. They called me up, and after that you were afforded free access subsequently?

A. Well, I was given free access, but I would say free access the second time I went there. I went there prepared to make photographs, in the first instance, but I was informed I couldn't even see the papers. Then I told them I thought if they would communicate with you that I could.

XQ. They did, and the door was opened. They communicated with me and the door was opened, was it not?

A. They communicated with some one and I assumed it was you.

XQ. Then you were given free access?

A. Yes, sir. I was then permitted to examine the papers, but not to photograph the papers.

XQ. But subsequently you were allowed to photograph them?

A. Yes.

XQ. You were given a large number of papers together with the books belonging to the Canal Company?

A. Yes, sir; the various papers and books relating to this question and investigation.

XQ. Among those papers which you were given were those which have been produced here by Mr. Hall, were they not, and marked by counsel for identification?

A. I think all of those that I saw.

XQ. Among the papers which were handed to you, with the papers which you have been testifying about, were these letters from the Department, also handed to you, with the drafts to which they referred?

A. Yes, sir; I think so. Yes, I think they were all among them.

XQ. These are the letters which have been offered as the two signatures of Mr. Eyster?

A. Yes, sir; although I think some of these letters accompanied earlier papers, in which his name appeared.

XQ. But these of 1870 and 1869 accompanied the drafts that have been produced here?

A. I think so.

XQ. Showing the signature of Mr. Eyster?

A. Yes, sir.

XQ. I hand you these letters: One dated, "Treasury Department, October thirteenth, 1870"; another dated April twenty-sixth, 1870; another dated October sixth, 1869, and another dated October fifteenth, 1868, and will ask you to look at these and see if the criticism which you have made of the letters dated November twenty-seventh, 1877, and November nineteenth, 1877, is not equally true?

A. I think not. I made a photograph of all those headings, an example of all the different ones.

XQ. Will you look at the heading of the letter dated October thirteenth, 1870, and see if the words "Treasury Department" are not in the middle of the paper in a very crude way?

A. That is true, it is not printed in the middle of the paper, but it is perfectly evident in my opinion, that that was purposely placed in that position.

XQ. I direct your attention to the heading on one of these other letters as being irregular and not uniform.

A. I would say it was irregular in that it is nearly in the middle of the paper and it is not printed straight on the paper.

XQ. It is not in the middle of the paper, at all, that heading?

A. No, sir. It is perfectly evident that that was intended to be put over to one side.

XQ. I hand you this one dated October sixth, 1869, and will ask you if the heading of that is not in the middle of the paper?

A. Yes, sir.

XQ. Then you would say the headings run uniform, you think?

A. No, sir. I have photographs here of all of the different examples that I had, to show that those three that were in dispute were different from any of the others; and in addition to that I think the three are crude examples of printing.

XQ. There is a lack of uniformity in all of these letters whether they are ones of the dates you have given, or other dates?

A. There is a lack of uniformity here in their different headings.

XQ. Might not it be said of the letters of April twenty-eighth, and April twenty-sixth, 1870, that that printing was decidedly crude?

A. I think that it would be cheap printing. I might say that. But it is, in my opinion, not of the character as shown upon the ones that we have been referring to here.

XQ. When you say that Mr. Eyster's signature in later years became a freak signature, what did you mean by that?

A. It is illegible. The letters are made not after any design that appears in any copy books that I have ever seen, and it is a peculiar combination of lines which stands for his name, but which is not his name, in actual handwriting.

XQ. Have you got that photograph which you were showing?

A. Yes, sir.

XQ. I think you called attention to these signatures of later days, showing that he ran his hand around and around and around and around a number of times?

A. Yes, sir.

XQ. The latter-day signatures?

A. Yes, sir.

XQ. What does that indicate, can you tell me? Does that indicate to your mind a man who was getting accustomed to signing his name, or a man who was developing a freakish or peculiar frame of mind?

A. I don't know what to attribute it to.

XQ. No business man who wants to sign his name as quickly as possible is going to run his pen or pencil around in a loop for a dozen or two times, is he?

A. Unfortunately, there are some bankers who do that very thing, which I think is very foolish and improper because it is an easy signature to imitate.

XQ. You think then, when you say that is a freak signature it is a peculiar sort of signature for a man to adopt?

A. Yes.

XQ. If he did adopt it, of course?

A. Yes.

JOHN J. R. KELLEY.

JOHN J. R. KELLEY, a witness being produced, sworn and examined, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Are you an employee of the Government?

A. I am.

Q. Where?

A. United States Sub-Treasury.

Q. Where?

A. At Philadelphia.

Q. Have you in your possession a paper taken from the files of that office?

A. I have.

Q. Dated 1871?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir.

Q. What is the paper you have in your hand?

A. It is a letter from the Secretary of the Treasury signed by J. F. Hartley, Acting as Secretary, enclosing a draft for collection on the Chesapeake and Delaware Canal Company, and October twenty-sixth, 1871, is the date.

Q. Where was that letter obtained?

A. In the files of the United States Sub-Treasury in Philadelphia.

MR. NIELDS: I offer in evidence this letter just produced by the witness, dated October twenty-sixth, 1871, and signed "J. F. Hartley, Acting Secretary".

MR. C. BIDDLE: I object to that going in evidence as being impertinent and irrelevant.

THE COURT: You object to it on the grounds—

MR. C. BIDDLE: I will withdraw the objection.

THE COURT: Then it is admitted without objection.

(Paper writing, letter, admitted in evidence and marked, "Government's Exhibit No. 64".)

MR. NIELDS: I also offer in evidence this copy book containing a copy of this letter which is annexed and adjoined to the draft of 1871, already admitted in evidence.

MR. C. BIDDLE: I want to renew my objection, which has already been made, to his offering the whole book. Let him offer the page in the book.

THE COURT: That is what you meant?

MR. NIELDS: Yes, sir. I offer in evidence this page of the book.

THE COURT: That is already in evidence.

MR. NIELDS: One of the pages is in evidence, but I now offer the other page, which is the page immediately preceding the page already admitted in evidence.

(The same arrangement heretofore entered into as between counsel is to apply to the letter press copy of the letter just above admitted in evidence, and the same is attached at the end of this record, being marked, "Government's Exhibit No. .)

NO CROSS-EXAMINATION.

MR. NIELDS: If the jury please, here are the two letters admitted in evidence, the letter dates October twenty-sixth, 1871, in this bound book of 1871, accompanying the drafts on the succeeding page, dated 1871, which, yesterday, were compared with the original draft.

MICHAEL J. O'REILLY.

MICHAEL J. O'REILLY, a witness having been previously sworn, and now recalled on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Did you ever see that book before?

A. Yes, sir.

Q. Under what circumstances did you find that book?

A. When I first saw the paper produced here, bearing the date October twenty-sixth, 1874, at the office of the Chesapeake and Delaware Canal Company, in Philadelphia, May, 1913, I had that fixed in my mind, as a draft of that date—had no understanding about it at all—and when I returned to Washington I made a search through the files and archives, and through these letter books for a press copy of a draft of that date, October twenty-sixth, 1874, but I could not find any such press copy. Later in the year, on the first of November, 1913, when Mr. Osborn and myself were

present in the office of the Chesapeake and Delaware Canal Company, in Philadelphia, and those papers were again produced, Mr. Osborn examined them, and taking this paper, now bearing the date of October twenty-sixth, 1874—

Q. Is this the paper?

MR. C. BIDDLE: I object as being immaterial and as prolonging the case unnecessarily.

THE COURT: What is the question?

Q. State the circumstances under which that copy book was found, pursuant to what information obtained, and just exactly the circumstances of obtaining that book, and what it shows.

MR. C. BIDDLE: We admit it contains the letters of 1871.

THE COURT: State the facts and not what other people said.

MR. GRAY: We object, because the book is in evidence. The book contains the letters written in 1871. It must be immaterial how Mr. O'Reilly came to get hold of this book which has been presented here and is in evidence. We don't know whether he found it in the garret, or in the cellar, or how he came to find it. Therefore, I ask that so much of the witness' answer be stricken out as relates to the finding of the book.

MR. NIELDS: There is no such testimony.

THE COURT: I think it is properly in. I do not think it is proper to show what were the mental operations of this witness. I suppose you were merely going to show, in a condensed way, just the facts?

MR. NIELDS: That is all. A juryman asked yesterday in regard to how that book was compiled, and just exactly its condition, so I wanted to show the circumstances under which that book was obtained.

THE COURT: Confine yourself as much as possible to that.

Q. Testify to the facts connected with that transaction.

A. I am not quite certain now, as to how far my answer is to be responsive to the question as originally put.

Q. Proceed along the line that you were taking, without giving any conversations, exactly what was learned, and what was done pursuant thereto.

A. This paper was produced in the office of the Chesapeake and Delaware Canal Company, at Philadelphia, and Mr. Osborn showed me this "4" as having been made from the "1", and he also showed me the erasure on the back of the paper, and on my return to Washington I set about to find the press copy book containing the copy of the paper as it originally existed, and after searching I found this book in the archives of the Treasury Department.

Q. You found the copy of that draft?

A. In this book.

MR. GRAY: I ask that the first part of the answer be stricken out as being improper, because the answer that the witness has just given, as to how he found this book, was full, and that was the question. If the witness goes through his mental operations, that has nothing to do with it.

(At the request of the Court the stenographer read the answer of the witness referred to by Mr. Gray.)

THE COURT: The first part of the answer is objectionable in that he states what Mr. Osborn drew his attention to, and that is hearsay.

MR. NIELDS: There was no conversation. He showed him certain facts.

THE COURT: I think that portion of the answer ought to go out, as to what Mr. Osborn said to this witness.

Q. In consequence of what you there learned, what did you find?

A. I found this letter book containing the draft, or, rather, I found a copy of the draft in this letter book, dated October twenty-sixth, 1871.

MR. GRAY: Mr. Nields expressed his purpose in recalling this witness, and after my objection to the Court, and Mr. Nields reframing his question at the suggestion from the Court, Mr. O'Reilly said he didn't know his answer would be responsive to the preceding question. Now, his answer from that time on, as reframed at the suggestion of the Court, I have no objection to, but I do claim that his answer before that, made after Mr. Nields had asked the original question, was not responsive to Mr. Nields' question, or to the purpose that Mr. Nields said he asked the question for. I therefore ask that the first part of the question be stricken out.

(At the request of the Court the stenographer here read that part of the testimony of this witness referred to by Mr. Gray.)

That where he states he did not find a copy of the letter under date of 1874, it is improper evidence for the issues in this case.

THE COURT: The Court does not agree with you.

MR. GRAY: Then I ask for an exception.

THE COURT: I do not know what your exception is.

MR. GRAY: I asked the Court to strike out the first part of the answer as not being responsive, and it being improper for the witness to state, in this case, that he failed to find a copy of the letter in the archives of the Government.

THE COURT: The Court considers the substance of the answer perfectly proper, but it is

not responsive. If it is stricken out it would lead the Attorney for the United States to put another question to the witness to elicit the same substance.

Q. Did you obtain that book in the Treasury Department in its present condition?

A. I did, sir.

Q. What were the facts and circumstances that led up to the finding of that book, or hunting for it?

A. When I was at the office of the Chesapeake and Delaware Canal Company, in the City of Philadelphia, in May, 1913, this paper which I hold in my hand, marked, Exhibit No. 12, that is, Government's Exhibit, was produced, bearing the date of October twenty-sixth, 1874, and on my return to Washington I hunted for the press copy of the draft bearing that date, October twenty-sixth, 1874, and failed to find it. On a subsequent visit—

MR. GRAY: I object to the answer of the witness, and ask that it be stricken out.

THE COURT: The Court declines to strike it out.

MR. GRAY: Then I ask for an exception.

THE COURT: The exception will be noted.

(Exception noted for defendant.)

A. (Continued.) On my subsequent visit to the office of the Chesapeake and Delaware Canal Company, in Philadelphia, on or about November first, 1913, being accompanied by Mr. Osborn, this paper was again produced and examined, and it became known to me at that time that it bore an erasure on the back of it; and I also observed, very closely, this date. On my return to Washington, bearing in mind the circumstances that occurred at that time and place, I searched the archives of the Treasury Department for the letter press copy book containing a copy of the draft dated October

twenty-sixth, 1871, and in consequence of that search this book was found there in the Treasury archives.

Q. Did you find that copy?

A. I did.

Q. What is an Acting Secretary of the Treasury?

A. An Acting Secretary of the Treasury is an Assistant Secretary of the Treasury, who performs the duties of the Secretary in the absence of the latter.

Q. Does any one ever act as Acting Secretary who is not an Assistant?

A. No, sir. Usually the senior Assistant Secretary, if present in the department, becomes Acting Secretary. At the time of these transactions, under the law there were two Assistant Secretaries of the Treasury. The Act of July eleventh, 1890, increased the number to three, which is the present number of Assistant Secretaries.

Q. That was in 1890?

A. In 1890.

Q. Prior to that time how many Assistant Secretaries were there?

A. There were two under the statutes.

Q. Was J. F. Hartley an Assistant Secretary of the Treasury?

A. I said that at the period of these transactions which we are discussing there were two Assistant Secretaries.

Q. From 1873 to 1877, inclusive, how many Assistant Secretaries of the Treasury, were there?

A. Two.

Q. Two?

A. Yes, sir.

Q. Do you mean only two offices or two in number?

A. Two offices, different persons. Different persons might have held that position within those years, so that the number of persons exercising the duties within the years 1873 to 1877 would be greater than

the number of two. The office of one person when vacated, was filled by the appointment of another.

Q. What kind of an office is this? How classed?

A. A Presidential office.

Q. A Presidential office?

A. Yes, sir.

NO CROSS-EXAMINATION.

HARRY H. WITMAN.

HARRY H. WITMAN, a witness produced, sworn and examined, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Are you an official of the United States?

A. Yes, sir.

Q. Where are you employed?

A. I am employed in the Treasury Department, Division of Appointments, which is in the Secretary's office at Washington.

Q. Have you any books here taken from the archives of that division of the Treasury Department?

A. Yes, sir.

Q. Do those books show who, in 1874, were the Assistant Treasurers of the United States?

A. Yes, sir.

By MR. C. BIDDLE:

Q. Do you know about this yourself what those books show?

MR. C. BIDDLE: I think the books ought to speak for themselves.

By MR. NIELDS:

Q. Have you the books here?

A. Yes, sir.

Q. Will you produce them?

A. Yes, sir.

MR. GRAY: What do you propose to show by this?

MR. NIELDS: These three papers, one bearing the name of "A. V. Holmes", dated October nineteenth, 1875, being one of the papers with which the Court and jury are entirely familiar, and the two papers dated November twenty-seventh, 1877, bearing the signature "Charles W. Hayes", I propose to show that those are fictitious names, and that no such person was Assistant Secretary of the Treasury of the United States.

MR. GRAY: I object to this evidence as being immaterial and irrelevant.

THE COURT: He has not offered any of them, as yet.

MR. GRAY: I object to the question he has asked the witness.

(At the request of the Court the stenographer here read the last question and answer of the witness; whereupon Mr. Gray withdraws his objection.)

Q. Have you the books before you, Mr. Witman?

A. I have a book called "Register of the Treasury", containing all the Assistant Secretaries for quite a number of years.

Q. Where were those books found, or obtained?

A. In the archives of the Treasury Department.

Q. In the Division of Appointments?

A. Yes, sir; in an extra room called the filing room of the Division of Appointments.

Q. There is where you belong?

A. Yes, sir.

Q. What are those books?

A. It is a book that is published every two years containing every employee in and under the Treasury

Department, that is, in Washington and out of Washington. It takes in all the Sub-Treasuries as well as other branches.

Q. By whom is that book published?

A. By the Government.

Q. What period of time is covered by the book you have in your hand?

A. 1873.

Q. What other book have you there?

A. A book printed every two years after that up to 1877, inclusive.

Q. You have the official registers showing who were the Assistant Secretaries of the Treasury?

A. Yes, sir.

Q. From 1873 to 1877, inclusive?

A. Yes, sir.

MR. NIELDS: I offer those books in evidence.

MR. C. BIDDLE: I object to the offering of this book as a whole. If he will offer a list of names in the book, or something of that kind, that will be a different proposition.

THE COURT: He wants to show certain names do not appear.

MR. C. BIDDLE: Let him offer the list of names which will cover all those he refers to. Can't he give us a list?

THE COURT: You want to put it in such a shape as not to swell the record?

MR. GRAY: I see no objection to his asking the witness if certain names appear there, or not.

THE COURT: I would suggest that he put it in that form, then.

MR. C. BIDDLE: Everything is incorporated on a page, and I suggest that he offers the page giving a list of the Assistant Secretaries of the Treasury during these years—one page. That will clear the matter up.

Q. Does this book, which I have in my hand, show the list of persons who were the Assistant Secretaries of the Treasury in the year 1875?

A. If you have the right book. There are several books.

Q. Will you produce the book showing the names of the persons who were Assistant Secretaries of the Treasury, in the year 1875?

A. They are right here, sir.

Q. How full a list is it before you?

MR. C. BIDDLE: I object.

(Question withdrawn.)

MR. NIELDS: My tender is to show that these signatures on these forged papers were not of people who were Secretary of the Treasury at the time alleged in these papers.

THE COURT: There is no objection to that, provided you go about it in the way that has been suggested.

MR. NIELDS: Yes.

Q. What is that register?

A. A register of the Treasury made in 1877.

Q. Does it, or not, contain a list of the persons who were Assistant Secretaries of the Treasury in the year 1877?

A. It does.

Q. Who, in that year, as shown by that official register, were the Assistant Secretaries of the Treasury of the United States?

MR. GRAY: I object as being immaterial to the issues in this case, as to who were all the Assistant Secretaries of the Treasury.

By THE COURT:

Q. How many were there?

A. There were only two at that one time, but in 1877 there were three.

THE COURT: Do you stand on that objection?

MR. GRAY: Yes, sir. We object to this question for the same reason heretofore stated to the document signed by Charles W. Hayes.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

(At 1.00 o'clock P. M. a recess was taken until 2.00 o'clock P. M. same day.)

2.00 o'clock P. M. Same day.

THE COURT: I wish to ask you whether you intend that objection to apply to the fact that the witness was undertaking to refer to the contents of that paper, the book being present in court and speaking for itself?

MR. GRAY: No, sir.

THE COURT: It has nothing to do with it?

MR. GRAY: No, sir. My objection was for the same reason Mr. Biddle stated to Exhibit No. 12 signed by Charles W. Hayes, Mr. Nields having stated that the purpose of this present offer was to show that Charles W. Hayes was not an Assistant of the Secretary of the Treasury of the United States.

THE COURT: Your objection was not based upon the ground that the book would speak for itself?

MR. GRAY: No, sir. In fact, so far as that goes, we would prefer, for compactness of the record, that the book should not be offered in evidence. And I distinctly did not make that objection.

THE COURT: I have been utterly unable to see why it is necessary to take up so much time in

reaching that point. The simple question is, whether the names of certain individuals appear as Assistant Secretaries of the Treasury.

MR. GRAY: As I suggested to your Honor this morning, we would be glad to have the question put to the witness. Does the name Charles W. Hayes appear as Assistant Secretary of the Treasury?—because I have made the same objection, and the only objection I desire to make.

THE COURT: What is the objection to that?

MR. NIELDS: None whatever.

THE COURT: Why couldn't you put the question then?

MR. NIELDS: I shall, sir. If the Court please, I have here a witness whom I desire to introduce out of order. There is a witness on the stand, but I will consume, perhaps, some little while in interrogating Mr. Witman. I ask now that he step aside, with, of course, the fullest privilege to counsel on the other side to cross-examine him when he again takes the stand.

THE COURT: Why do you wish to suspend?

MR. NIELDS: The records will show who were the Assistant Secretaries of the Treasury, but it will take some while for me to conclude his examination, but I do desire to conclude the examination of the witness whom I am next producing. I, therefore, ask the privilege of suspending with this witness for the present.

THE COURT: You have a substantial reason, then?

MR. NIELDS: I have.

THE COURT: The Court will permit it being done.

(The further examination of the witness, Harry H. Witman, is suspended for the present.)

JAMES ALEXANDER LESLIE WILSON.

JAMES ALEXANDER LESLIE WILSON, a witness produced, sworn and examined, on behalf of the United States, testifies as follows:

By **MR. NIELDS**:

Q. You have stated to this Court and jury that your full name was what?

A. James Alexander Leslie Wilson.

Q. Where do you reside?

A. In Philadelphia.

Q. What is your age?

A. I will be eighty-one years old on the seventeenth of this month.

Q. What is the condition of your sight?

A. I can see as in a very heavy fog. That is, I can't see the person who is addressing me now. I do not know who it is, although I can see there are persons here in the room. I can see a gentleman sitting here at the table, but I can't see beyond that, at all.

Q. Are you able to read?

A. Not at all, except in the blind text. I have learned to read the blind books.

Q. Were you an employee of the Chesapeake and Delaware Canal Company?

A. I was.

Q. When did you enter the employ of that company?

A. In 1855, on the twenty-third of March, if I recollect rightly.

Q. Who were the officers of the company in charge of the office business?

A. Henry V. Leslie, my cousin.

Q. How was he your cousin?

A. He was my cousin; yes, sir.

Q. Your first cousin?

A. My first cousin. My mother's sister's son.

Q. How long did you remain in the employ of that company?

A. Until 1886. I suppose the first day of July, or the thirtieth day of June. I never was there after that. It was on the thirtieth of June, that I was there, but not on the first of July.

Q. What were your duties as an employee of the defendant, the Chesapeake and Delaware Canal Company?

A. At first, when I went there, to keep certain accounts, principally of the freight, and that kind of thing, and collect drafts, going to bank, and all those kinds of things that a young man will do.

Q. I will repeat the question, and have you repeat the answer, as some of the jurymen did not understand you.

A. When I first entered the employ of the company, I collected drafts for them, attended to going to bank and back again, kept certain accounts, principally with regard to freight, the movement of freights, and to accounts, receipts for tolls, and all such things as that. I cannot describe them with more particularity.

Q. To what bank did you go?

A. To the Philadelphia Bank and the North American Bank. First the Pennsylvania Bank, before it failed, and subsequently it was the North American and the Philadelphia, as far as the company was concerned.

Q. What did you do in the matter of going there, did you say?

A. Just making deposits as they were given to me.

Q. You started in 1856?

A. In 1855.

Q. In 1855?

A. Yes, sir.

Q. And as the years went by did your duties change, if any?

A. I began to fill up checks for interest, interest checks and to prepare tables for the board of the receipts of the companies taken from the books and of the papers of the Canal Company.

Q. Where was the principal office of the Chesapeake and Delaware Canal Company while you were connected with it?

A. First at 83½ Walnut Street, afterwards 304 Walnut Street, then in the Navigation Building, at 417 Walnut Street, and finally at 528 Walnut Street.

Q. Who was associated with you in the conduct of the business of the Canal Company at its office?

A. My cousin, Mr. Leslie, and at one time we had a young man there, a nephew, I think he was, or, perhaps, a brother-in-law—he was quite young, however—for eight months or a year, I guess, who took my work of collecting the drafts. But that was twenty years ago. That was about the war times, or during that period. I cannot say exactly.

Q. It was during the period of the war?

A. I presume it was during the period of the war.

Q. About that time?

A. About that time; yes, sir.

Q. What books did the Chesapeake and Delaware Canal Company have?

A. Do you mean account books?

Q. Yes.

A. Two ledgers—three ledgers, a cash ledger in which the current business was kept, the stock ledger containing the names of the stockholders, and the loan ledger. Also had a day book, and what was called a waste book, a kind of a journal in which every one of the items were not placed, but only the aggregates, and the cash book in which the cash accounts were kept. There were one or two little books called “draft

books". When drafts were sent up to the office they were entered in a small book which I carried around with me to different parties to keep account of the drafts.

Q. Will you kindly repeat the last part of your answer?

A. There were little draft books that I could carry in my pocket in which the names of the persons from whom I was to collect the amounts and the amounts to be collected, were entered by myself when the draft came in. I carried that around with me, and the total of that was deposited in the Philadelphia bank, usually to the credit, or always to the credit of Mr. Leslie, to his personal account. All of those things, they contained both the toll of the canal and the towage of the vessels of the Steam Tow Boat Company, which was connected with the canal.

Q. What books, relating to dividends, did the company have?

A. The dividend receipt books and the dividend ledger—I mean the stockholders' ledger.

Q. What did you have to do in connection with those books?

A. And the check books; there were separate check books. As to what I had to do with them: At first, nothing. Subsequently, as far as dividends were concerned, I guess I began, about that time, to fill up the receipt books.

Q. About that time?

A. (Continued.) To fill up the receipt books with the names, the amount of stock, and the amount of dividends, in which books there were entries made.

Q. And what was that dividend receipt book?

MR. NIELDS (addressing Mr. Walter Hall in the courtroom): Mr. Hall, have you produced that book?

MR. WALTER HALL: I have.

Q. How were the dividends to the United States paid, when they were paid? First, may I ask, was the United States a stockholder?

A. It was; yes, sir.

Q. Do you remember how many shares of stock the United States held in the defendant company, the Chesapeake and Delaware Canal Company?

A. At first, it runs in my mind, that it was something like twenty-two hundred and fifty—about that.

Q. When did the amount change?

A. It eventually amounted to fourteen thousand. The shares were originally of two hundred dollars each, par value, and they were afterwards changed to fifty dollars each; so that four shares were issued to each stockholder for one held before; and a dividend was declared on that, and a second dividend. So that eventually the stock of the United States amounted to fourteen thousand and odd shares. I cannot recall the figures exactly.

Q. Your statement is fourteen thousand and some hundred shares?

A. Yes, sir.

Q. Mr. Wilson, how was the United States paid when dividends were declared?

A. They were paid by check, as others were paid. A check was sent off for the amount of the dividend.

Q. What notification, if any, did the United States receive?

A. There was generally a letter sent down to the Treasury of the United States stating that a dividend was declared.

Q. By whom was the letter sent?

A. By Mr. Leslie.

Q. To whom was it sent?

A. To the Treasury of the United States.

Q. And it was sent by Mr. Leslie?

A. Yes, sir.

Q. What was the letter?

MR. C. BIDDLE: If there was any letter, let it be produced.

Q. Mr. Wilson, do you remember about how many dividends were declared by the defendant company in its history?

A. I couldn't state that accurately at all. I know that there was one dividend in 1853. That was before I was there, but I knew of that dividend; and subsequently, immediately after the War of the Rebellion, dividends were recommenced, and I think that was in 1866 or 1867. I can't tell that exactly, at all. And then, for several years semi-annual dividends of three per cent. were paid; and eventually, the receipts of the company fell off considerably, very heavy damage having occurred at one point on the canal. But they paid once or twice, two per cent.—one and a half or two per cent.—I guess it was one and one-half per cent.—paid one of three per cent., but only one dividend a year—I guess that was it. I can't recall that exactly, but the books will show that.

Q. Now, as to the dividends declared in June, 1873, June, 1875, and June, 1876. Will you state to the Court and jury all the circumstances relating to the dividends due the United States?

A. There was a third bank, which I did not speak of in my former answer, and that was in New Castle, where the funds, the cash funds, taken at the canal, were deposited and then eventually drawn from there and placed in the Philadelphia bank.

Q. Will you state to the Court and the jury all the circumstances relating to the share of the United States in those dividends?

A. There was not sufficient money to pay the dividends and to pay the interest, which followed immediately, and for that reason, the United States was not notified of the dividends.

By THE COURT:

Q. What year was that?

A. 1873; the dividends of 1873, amounting to twenty-one thousand and some odd dollars.

By MR. NIELDS:

Q. Will you state to the Court and jury why there was not enough money to pay that dividend to the United States?

A. The money had been used by Mr. Leslie and myself, for other purposes, but without the knowledge of the company.

Q. Mr. Wilson, will you state to the Court and jury just how you, yourself, used that fund, and under what circumstances?

MR. C. BIDDLE: I object, because he did not say that he had used it. He said that he and Mr. Leslie used it. It is not fair for Mr. Nields to answer back in his question.

THE COURT: You cannot assume that, Mr. Nields. That does not appear in the case, so far. Therefore the exception is well taken.

Q. Will you state, Mr. Wilson, the circumstances under which you and Mr. Leslie used the funds of the company without its knowledge?

A. I cannot speak for Mr. Leslie, when he was there, but for myself I can tell as to how I did come, or how it was that I should have used the funds of the company for other purposes.

Q. Will you state those circumstances?

A. I had moneys handed to me from a relative of my wife's family, and—

MR. C. BIDDLE: I object to this testimony as being irrelevant and improper, unless followed up by something in addition. It, of itself, is not evidence to rebut the presumption of payment in this case. This objection goes to the witness' testimony.

THE COURT: Mr. Nields, do you propose to follow this up?

MR. NIELDS: I do, sir.

THE COURT: Then the objection is overruled. (Exception noted for defendant.)

THE COURT: As the Court has stated heretofore, in the trial of a case a great deal of evidence is admitted on the assurance of counsel that it will be followed up. Of course, all this is subject to the ruling of the Court when it comes to the charge to the jury, and if anything has been admitted improperly, in the judgment of the Court, the jury will be expressly instructed to disregard it.

Q. Will you now state, in as loud a voice as you can, because I am standing some distance from you, all the circumstances incident to your taking that money?

A. I had received a considerable amount, over twenty-five hundred dollars, perhaps—I cannot recollect the exact amount—from a relative of my wife, and I had given it to Mr. William G. Bedford to invest for me. He was a real estate dealer and had been doing conveyancing, and all that kind of thing, and I thought he was wealthy enough to be perfectly secure in regard to that; and, eventually, perhaps within a year or more afterwards, after I received the money, Miss Eyre called for her money and I asked Mr. Bedford to return me the money, telling him my circumstances and telling him that I was obliged to send the money back; and after some time he gave me a check for the amount I had given him, about twenty-three hundred or twenty-four hundred dollars.

By THE COURT:

Q. Who gave you a check for it?

A. Mr. Bedford gave me his check to return the money which I had given him to invest for Miss Eyre. That check was returned to me from bank marked

"No funds". I was very much worried, but still expected to get it, and I called on Mr. Bedford about it and he said that in a day or two he would receive a large amount of money from insurance and he would make the check good. I received another letter from Miss Eyre pressing me to send the money to her. So I took the two checks, coming in from the two steam lines and deposited them in my own account.

Q. What steam lines were they?

A. The New York and Baltimore and the Philadelphia and Baltimore lines.

Q. To whom did those checks belong?

A. To the Chesapeake and Delaware Canal Company, and should have been deposited in the Philadelphia Bank, but I deposited them in my own account, and sent the money on to her, Miss Eyre.

Q. What was the total amount of those checks?

A. Twenty-six hundred and ten dollars and nine cents. I could ordinarily recall it, but, of course, all these things I am not positively certain of, but I think it was twenty-six hundred and ten dollars and nine cents. For a long time it was on my mind and I could have told you almost at any time. I think I stated the amount at one time before both of you gentlemen who were counsel for the company and the Government. I think I stated the amount at that time, which was correct.

By THE COURT:

Q. What is the amount?

A. Twenty-six hundred and ten dollars and nine cents.

Q. Is that the sum of the two checks, or different checks?

A. That was the sum of both checks, I think.

By MR. NIELDS:

Q. Then what happened?

A. Mr. Bedford failed, asked for more money, told me of the difficulties in which he was, and I then advanced him a little money.

Q. You advanced money to whom?

A. To him.

Q. To whom was that?

A. Mr. William Bedford.

Q. From what source did you advance that money?

A. I took further sums from the company. I should say (he) William Bedford, had built a large number of houses and many of them were in my name. I had an interest in those properties which were built.

Q. In the year 1873, Mr. Wilson, how much of the funds of the Chesapeake and Delaware Canal Company had you appropriated?

A. I couldn't tell you exactly, but I think in the neighborhood of twenty thousand dollars.

Q. Twenty thousand dollars?

A. Yes, sir.

Q. What followed in the year 1873?

A. I learned from Mr. Leslie that he was going to send a notice to the Government and I went to him and confessed that I had taken the money, and told him that I would pay it by selling all my property as rapidly as possible,—that I would make it good if he would give me a little time. In looking over the accounts I discovered that there was not, in the two banks together—I cannot remember now the amount, but that there was not sufficient money to meet the interest and pay the dividend, as it stood.

Q. By how much was it short?

A. I suppose, beside the twenty thousand dollars of which I spoke, the difference between the cash book balance, which was supposed to represent all the cash of the company, and the deposits in those two banks, the Philadelphia bank and the New Castle bank, was in the neighborhood of fifty thousand dollars.

Q. Fifty thousand dollars?

A. That I cannot say exactly, but probably about that much.

Q. Did you learn the occasion of the additional shortage of thirty thousand dollars?

A. I did not know. I simply told him that his accounts were in worse condition than my own, that he owed the company more than I did.

Q. Was that the fact?

A. That was the fact.

Q. That was the fact?

A. Yes, sir.

Q. So that you and Leslie together had misappropriated how much?

A. In the neighborhood of fifty thousand dollars, at that time.

Q. Of the funds of this defendant company?

A. Yes, sir.

Q. In the year 1873?

A. Yes, sir.

Q. What was done by you in reference to determining what was necessary, if anything?

A. At that particular time, nothing, during that year, except there was no notice sent to the Government.

Q. To whom?

A. There was no notice sent to the Treasurer of the United States, as had been done before, and no word came from the Government about it; and so the matter rested until some of the directors, one or two of the directors—Mr. Gray, for instance, spoke of it once or twice and said, "Hasn't the Government been paid yet?" And Mr. Edwin Swift, one of the directors asked once or twice about it and was told that they had not been paid as yet, and he urged that we should pay it at once. So it became necessary to make some evidence in case we should be called on, and eventually he was told they were paid—both Mr. Gray and Mr. Swift were told. They were told, eventually, both Mr.

Gray and Mr. Swift, that they had been paid, that is, that the amount had been paid to the Government.

Q. By whom were they told?

A. In one case by myself, and, I presume, Mr. Leslie spoke of it. I cannot recall except of the one interview with Mr. Swift, and I told him the matter had been settled. That was my reply to him, that the matter was settled.

Q. What else was done? Mr. Wilson, what else, if anything, was done by you, or Mr. Leslie, or others?

A. Mr. Leslie and I thought it was necessary that some voucher should be made in case we were called on by the directors in the future. That was done before Mr. Swift asked the question of me—both he and Mr. Gray had asked it before, and they were told that they were not paid, but before I told him that the matter had been settled, I had suggested to Mr. Leslie that we ought to make a voucher to file with the company, to hold ourselves, to show some kind of a receipt for it. So that was done. The voucher was so prepared and filed with the company. That was kept by ourselves, but it was never called on. Neither of the gentlemen ever saw it, or questioned further about it.

Q. Do you recall distinctly the form of the voucher that was then prepared by you or Mr. Leslie?

A. I cannot separate the three times that that was done. I cannot tell which was which, unless I get some information from the books, or a kind of voucher that was prepared in each case; but something of that kind was done for three dividends.

Q. Coming now, to the next dividend of June, 1875, Mr. Wilson: State to the Court and jury what was done then, by you or Mr. Leslie.

A. The same method was pursued. The money was withheld and used for other purposes, and vouchers of some kind were prepared, but which of the three different vouchers, or kind of voucher, I cannot recall.

Q. You cannot recall which?

A. Unless I was given some intimation. I might recall if I was to read, or could hear exactly how they stood—I might recall the circumstances.

By A JURYMAN:

Q. This witness has stated that when dividends were declared checks were sent to the United States Treasury, was that right?

A. Checks were sent except for those three dividends.

Q. That had been the custom to send checks to the United States Government?

A. Yes, sir; to send checks to the United States for the amount.

By MR. NIELDS:

Q. How was that sent?

A. Just by letter, in the ordinary way, "Enclosed please find a check for the dividend."

By A JURYMAN:

Q. I also understand it is the contention of the Government that notice was sent to the United States Treasury, and in consequence of that notice a draft was made on the Sub-Treasury in Philadelphia and eventually cashed at the office of the company, wasn't that your statement?

A. I believe that was the usual way of doing it.

Q. My desire was to get straight on the matter. This witness has stated that it was the custom of the Canal Company, when dividends were declared, to send checks to the Treasurer of the United States, to the Government. That was your statement, was it not?

A. In response to an order from the Government, to send them, of course. Notice was sent first to the Government that a dividend had been declared, and the Treasurer, or some officer of the Government would send a draft up for payment.

By MR. NIELDS:

Q. Mr. Wilson, I want to ask you in regard to these papers. You have said that you could not describe the vouchers that you and Mr. Leslie filed, without having them read. I now read a paper dated November nineteenth, 1875—this is the 1875 dividend:

“Treasury Department. Sir: I am directed by the Secretary to acknowledge the receipt of your letter of the 17th inst. containing check for \$14,625, being for a dividend on the stock of the Chesapeake and Delaware Canal Company, now owned and held by the United States. Very respectfully, A. V. Holmes, Asst. Secretary.”

Then below is “Henry V. Leslie, Esq., Secretary and Treasurer, Chesapeake and Delaware Canal Company, Philadelphia.”

Can you explain to this jury the circumstances of the preparation of that draft, or what purports to be such?

MR. GRAY: If there ever was anything leading and suggestive to a witness in the trial of a cause, that question is.

MR. NIELDS: The witness has testified that he and Leslie filed a voucher which they, themselves, had made, and he (witness) asked that that paper be read, and I described it as a draft, or what purports to be such.

I will modify my question to this extent; or what purports to be a receipt of a check.

MR. GRAY: I object.

(Question withdrawn.)

Q. Can you explain to this Court and jury a paper that reads as follows:

“Treasury Department, November 19th, 1875.

Sir:

I am directed by the Secretary to acknowledge the receipt of your letter of the 17th inst.

containing check for \$14625, being for a dividend on the stock of the Chesapeake and Delaware Canal Company now owned and held by the United States.

Very respectfully,

A. B. Holmes, Asst. Secretary.

To Henry V. Leslie, Esq.,
Secretary and Treasurer,
Chesapeake and Delaware Canal Company,
Philadelphia"?'

A. That was 1875?

Q. Yes.

A. I can say to that, it was prepared by Mr. Leslie and myself, and, perhaps, with the assistance of another gentleman in the office of the company, and did not emanate, in any way, from any officer of the United States.

Q. Did not emanate from any officer?

A. Or employee of the United States.

Q. You say that it was prepared by yourself and Mr. Leslie, and possibly, another person?

A. Yes, sir.

Q. Whom do you mean when you say "another person"?

A. Wymer Bedford, a brother of William.

Q. What preparation did you make with reference to that paper?

A. Probably copied it from some former paper which had been received. Probably there were other papers.

MR. C. BIDDLE: I ask the witness not to say what was probable, but to state facts.

A. (Continued.) All I can say, is, that my recollection of it is that a copy of it was made of a former paper stating the receipt of a check. Just such a paper as that, a genuine one, and filed as evidence on the paper to the Board of Directors—as evidence to the Board of Directors of payment.

By THE COURT:

Q. Does your testimony on this point relate to the year 1875?

A. 1875, yes, sir. That was the dividend of 1875. May I ask a question to refresh my memory?

By MR. NIELDS:

Q. Will you explain, if you can, to this Court and jury the following papers, reading as follows:

"Treasury Department, November 27th, 1877.

Sir:

I have this day forwarded to the Assistant Treasurer of the United States at Philadelphia a sight draft upon you to his order for \$14625, being the cash dividend due the United States on the stock of the Chesapeake and Delaware Canal Company, as advised in your letter of the 8th inst.

Very respectfully,

Charles W. Hayes,

Assistant Secretary.

To Henry V. Leslie, Esq.,

Secretary and Treasurer,

Chesapeake and Delaware Canal Company,
Philadelphia";

and a paper of like date, November twenty-seventh, 1877, as follows:

"Treasury Department.

\$14625.

Pay to the order of George Eyster, Esq., Assistant Treasurer of the United States, at Philadelphia, the sum of fourteen thousand six hundred and twenty-five dollars, amount of dividend declared on the stock owned by the United States of the Chesapeake and Delaware Canal Company";
this also being signed,

"Charles W. Hayes,

Assistant Secretary.

To Henry V. Leslie, Esq.,

Treasurer,

Chesapeake and Delaware Canal Company,
Philadelphia";

A. Both of those papers you speak of were prepared in the office from copies of letters formerly received. As regards the names, I do not know whether the same names were copied, except in the case of Mr. Eyster. That was put in, in the body of the letter, or the body of the draft, whichever it was. The other names, I cannot recall whether those names were copied, or not, but both of those were prepared in the same way, to be filed as vouchers.

Q. What, if anything, have you to say as to the printed letter head "Treasury Department" on those two papers, the letter and draft?

A. They were prepared by myself and Mr. Leslie; possibly by a third party, and printed with a small printing press which I bought and gave my son. I had difficulty in getting the text here for the word here "United States", which was of very peculiar type, and I obtained something that looked very much like the former letter from which that was a copy, from the old letters of which that was a copy, both the form and the wording, so that if any particular member of the Board of Directors should call for it to see it—which they did not—they might suppose it was a correct letter.

Q. On the back of the draft, or what purports to be such, dated November twenty-seventh, 1877, appears the following endorsement:

"George Eyster, Assistant Treasurer, U. S."

How, if you know, was that placed there?

A. It was placed there by one of three parties, either myself, or one of the others. I can scarcely tell that, as to which did it. I cannot recall that; but Mr. Eyster had nothing whatever to do with it, any more than you gentlemen here have—could not know of it; and he never signed it, because it was signed by one of us three—the name was placed there, I mean.

Q. You have spoken of the name being placed there by one of three, and the printing being done by

one of three persons. What three persons do you mean?

A. Mr. Leslie, myself, or Mr. Bedford.

Q. What Mr. Bedford?

A. Wymer Bedford.

Q. How did Wymer Bedford get into this?

A. He was engaged with me, having separated from William Bedford, in building. He was engaged with me in taking care of the estate and making the exchanges, and selling, and all that kind of thing—attending to the whole business, which I had not time to do.

Q. How did Wymer Bedford get into this business, and by “this business”, I mean the fabrication of these vouchers?

A. Because I told him of the necessity of it. He was my personal friend and did it for me, and to assist me to get through, hoping all the time of being able to refund the amount. He (Wymer Bedford) had no pecuniary interest in it himself. It was done to assist me from exposure. You will understand that these drafts were not to be used outside, but were to be held by ourselves simply as evidence in case we should be called on by the Directors to show, as vouchers, but we were never called on to do so. Of course, they were unknown or unseen by anybody except ourselves.

Q. Was Wymer Bedford connected with, or did he, in any way, represent the United States?

A. He was in the army, only.

MR. C. BIDDLE: I object to these questions as being leading.

By THE COURT:

Q. What relation, if any, did he bear to the United States?

A. He was an officer in the Army of the Rebellion.

By MR. NIELDS:

Q. Since the Rebellion has he had any relation with the United States?

A. None at all, except he was in receipt of a pension. He was wounded in the battle of Tennessee.

Q. Is he now living, or dead?

A. He is dead.

Q. Mr. Wilson, I turn now to another paper, dated October twenty-sixth, 1874, which reads as follows:

“Treasury Department.

October twenty-sixth, 1874.

\$21937.50.

Henry V. Leslie, Esq., Treasurer, Chesapeake and Delaware Canal Company:

At sight please pay to George Eyster, U. S. Assistant Treasurer at Philadelphia, Pa., or order, for deposit to the credit of the United States, the sum of twenty-one thousand nine hundred and thirty-seven dollars and fifty cents, being dividend on stock in the above named company held by the United States.

J. F. Hartley, Acting Secretary.

Endorsed: George Eyster, Assistant Treasurer.”

(The above paper is Government's Exhibit No. 12.)

Will you explain that?

A. That was a fictitious document. It was prepared by Mr. Leslie and myself. I do not remember whether Mr. Bedford had anything to do with it, or not. I can't say. But I know Mr. Leslie and I prepared that.

MR. NIELDS: This is a book which Mr. Hall presented. It is the dividend receipt book of the Chesapeake and Delaware Canal Company.

THE COURT: Was that offered in evidence?

MR. NIELDS: I now offer it in evidence, with reference solely to those entries in this book relating to the dividends paid the United States.

I have no objection to it going in generally, but I assume that the learned counsel for the defense do not desire it.

MR. C. BIDDLE: I do not desire it to encumber the record, and I suggest the stenographer copy out of this the entries during the years that Mr. Nields wishes to cover.

MR. NIELDS: I have no objection to that.

MR. C. BIDDLE: Just tell us where you wish those entries to cover.

MR. NIELDS: At the present time I tender the book with reference to dividends Nos. 15, 16 and 17, relating to the share of the United States in those dividends, to wit, the dividends of 1873, 1875 and 1876.

THE COURT: I understand counsel on both sides are perfectly willing that all the entries relating to those particulars just mentioned should be reproduced in copy?

MR. GRAY: We have the same objection to the introduction of this book that we made to the introduction of these various papers and documents which were inspected by witnesses here in behalf of the Government.

MR. C. BIDDLE: It will be subject to our objection that it is inadmissible.

THE COURT: Then you agree that, subject to your objection on the general ground, it should go in?

MR. C. BIDDLE: Yes.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

(Admitted in evidence, subject to objection, and marked "Government's Exhibit No. 66".)

Q. On page 185, Mr. Wilson of the dividend receipt book, appears the following entries:

“United States of America		
Shares	Dividend	When Received
14625	21937.50	October 30th, 1874
Received		
William Y. Beale, per order.”		

Who, if you know, wrote the signature “William Y. Beale, per order”?

A. I did that. I can recall that.

Q. Who was William Y. Beale?

A. I don't know. I never heard of him that I know of. I cannot recall the name at all except that I wrote it there. It is a fictitious name. That is in my handwriting.

Q. Was there any such person as “William Y. Beale”, representing the United States, or any institution to your knowledge?

A. Not to my knowledge.

Q. Or in existence, to your knowledge?

A. Not to my knowledge. I never knew of any such person.

Q. Mr. Wilson, on page 185 of this dividend receipt book appear the following entries:

“United States of A.		
Shares, 14625.	Dividend 14625.	When received
		December fifth, 1877.
Receipt, William Y. Beale, per order.”		

Who, if you know, wrote the name “William Y. Beale”, on that book?

A. I did, sir. That is my handwriting.

Q. Was there any such person?

A. Not to my knowledge. I never knew of any person by that name.

Q. For what use was this book in which these entries, “William Y. Beale”, were made by you?

A. It was a dividend receipt book to show the receipt of dividends.

Q. Did the United States receive its share of the dividend No. 15 declared June, 1873?

MR. C. BIDDLE: I object to the question as being leading. The witness has no right to testify as to what he cannot know. He ought to be asked to tell anything he knows about any dividends. I do not object to that.

MR. NIELDS: This witness has testified to fifty thousand dollars being misappropriated by himself and Leslie, that fabricated vouchers were made by himself and Leslie, possibly another one, Wyman Bedford, his friend, and that he, on the dividend receipt book, himself, placed the name of "William Y. Beale", a purely fictitious one, which purports to acknowledge receipt of these dividends by the United States; and I asked him whether or no the United States received its share of those dividends.

THE COURT: If he knows it.

MR. C. BIDDLE: I say, he ought not to try and lead him in that way. He ought to ask him what he, himself, did. He cannot say what somebody else may have done without his knowledge.

THE COURT: This inquires for knowledge.

MR. C. BIDDLE: It does inquire for knowledge, but it assumes that he can answer the whole question as to what was done. I want him to give all his personal knowledge about that dividend about which Mr. Nields has asked him.

By THE COURT:

Q. State whether or not you have any knowledge of the payment of the dividend, to which you have referred, to the United States.

A. I have a certain knowledge that it was not paid out of the Chesapeake and Delaware Canal Company's funds before or prior to 1886, because I had a knowledge of all the payments that were made, at that time.

By MR. C. BIDDLE:

Q. What are you smiling about? You seem to have a broad smile on your face?

A. I was smiling about where the funds were to come from to pay it. The Canal Company didn't pay it. That is what I am certain of. It was not paid out of the Canal Company's funds.

By MR. NIELDS:

Q. Is that true of the dividend declared in 1873, 1875 and 1876?

A. True, of all three.

Q. On page 185, Mr. Wilson, under the head "United States of America, shares 14625, dividend 14625, when received, November nineteenth, 1875, receipt, Henry V. Leslie, Atty."

What were the circumstances incident to that?

A. I do not recall the fact that that was Henry V. Leslie's signature. I was told it was Henry V. Leslie's signature on the back. I know it was not paid by him, and I presume—if I am correct in speaking my presumptions in the matter—that that was in response to that voucher which was received stating that the check had been received.

Q. You say you know the dividend was not paid?

A. I know that dividend was not paid.

MR. NIELDS: I desire to put in evidence these photographs, which are photographs of those entries.

MR. GRAY: We enter the same objection as applied to the book.

THE COURT: Is there any other objection?

MR. GRAY: No, sir.

(Photographs admitted in evidence, subject to the objection, and marked, "Government's Exhibit Photograph No. 3.")

(Mr. Gray here called the attention of Mr. Nields to the fact that he had referred to the book by pages, when no pages were given in the book.)

MR. NIELDS: Evidently this book was printed for the period covered by the year 1850 and subsequent years, and that number appearing here in the upper right-hand corner of each page, I, inadvertently, gave that as the number of the page.

Q. Mr. Wilson, by reason of what subsequently occurred in connection with your relation with the Chesapeake and Delaware Canal Company, which you say ended in 1886, did you receive any criminal punishment?

A. I did.

Q. Will you state to the Court and jury just exactly what that was, and for what?

A. I believe the charge was conspiracy. I was sentenced to five years in the Eastern Penitentiary, and served the sentence.

Q. Conspiracy with whom?

A. Mr. Leslie.

Q. For what?

A. Conspiracy. I don't know what the terms were, or what the language was, but it was simply that I was told by the attorney that I was under the charge of conspiracy, I presume, to defraud.

Q. In connection with other transactions than this?

A. In connection with other transactions than this.

Q. Did you serve that sentence?

A. I did.

CROSS-EXAMINATION.

By MR. C. BIDDLE:

XQ. Mr. Wilson, all the people who were connected with the Canal Company at the time of 1873, 1874, 1875, 1876 and 1877, are dead now, aren't they, except yourself?

A. Do you mean the Board of Directors?

XQ. No; I mean the officers.

A. Yes, sir; I believe they are all dead, in the office, but down there at the canal, I don't know.

XQ. I mean every person who knew about these accounts, and these various items, they are all dead?

A. Every one is dead who knew of those transactions, or the business of the company, at that time.

XQ. You have a vivid recollection of everything that occurred in 1873, and prior thereto, before you began to take the company's money, haven't you?

A. Before I began to take the money?

XQ. Yes.

A. I have a fair recollection of it, yes.

XQ. As I understand it, the company paid dividends to the United States Government on their stock?

A. Yes, sir.

XQ. From 1868, when Mr. Eyster became Assistant Treasurer, up to 1873, regularly every year, twice a year?

A. From 1868 to 1873?

XQ. Yes.

A. I believe every year from that time, from 1868 on, every year, three per cent. every half year.

XQ. So that the Chesapeake and Delaware Canal Company paid to the Government, through Mr. Eyster, stationed at Philadelphia, about forty-five thousand dollars a year, paying one-half every six months?

A. I forget whether the last dividend—whether the stock was not increased after 1868. Both dividends were paid before 1868, long back from 1868, down to 1873. If the receipt book there will show that in 1868 the stock stood at fourteen thousand two hundred and fifty shares, then that statement is correct. From 1868 to 1873, every year, six per cent.

XQ. I have here a statement taken from the book which shows that in 1868 the Government had eleven thousand two hundred and fifty shares, and paid therefor in that year, sixteen thousand eight hundred and seventy-five dollars semi-annually?

A. That is correct.

XQ. And they continued to do that until 1870 when the number of shares of the Government were increased to fourteen thousand six hundred and twenty-five?

A. That was a stock dividend. That is correct.

XQ. And from that time they paid, semi-annually, to the Government through Mr. Eyster, twenty-one thousand nine hundred and thirty-seven dollars and fifty cents, is that correct?

A. It is correct up to 1873, but the dividend of 1873 of twenty-one thousand dollars was not paid. Except for that, it is otherwise correct.

XQ. The dividend you are now speaking of is the dividend which you say you took?

A. Yes, sir; that is correct. The others were all paid.

XQ. Through Mr. Eyster, who was Assistant Treasurer in Philadelphia?

A. I presume he was, although I can't say now he signed for every one of them, but he signed a number of times on the book. I can't recall the gentleman himself. I don't recollect his face, but I know that he was in the office once or twice.

XQ. Don't you know that all those dividends were paid through him during those years?

A. I believe they were.

XQ. Mr. Wilson, you actually superintended the giving of the necessary publication of the declaration of dividends, did you not, yourself?

A. Do you mean that I wrote the advertisements?

XQ. No. You saw they were put in the papers?

A. Yes, sir; they were sent to the papers.

XQ. At the declaration of each dividend a public notice was given that the dividend had been declared?

A. Yes, sir; and will be payable on a certain date.

XQ. That was published in the newspapers?

A. Yes, sir.

XQ. The fact that dividends were declared each year was published in your annual report, wasn't it?

A. Yes, sir.

XQ. And that annual report was regularly given, or sent, to your stockholders?

A. Given to them when they called for it. We did not send them by mail, or anything of that kind. They were kept in the office there and anyone who wanted them took them.

XQ. For public distribution?

A. Yes, sir; for public distribution, for any one who wanted them, no matter who.

XQ. And that was done from 1868, up until the payment of the last dividend in 1877?

A. Yes, sir.

XQ. You again took money from this company in what year?

A. I think I couldn't give you accurately that, but probably about 1870—the latter part of 1869 or the early part of 1870. Maybe it was in 1870, when I took the first amount.

XQ. Let me see if I can understand the system which you worked on the company.

A. Yes.

XQ. Whenever a creditor of your own pressed you for payment, you took, in some way the money of the company?

A. Yes, sir.

XQ. And applied it to the payment of that debt?

A. Yes, sir.

XQ. With the intention, of course, of returning that money to the company, were you able to do so, in the future?

A. Yes, sir.

XQ. And if you took money, which the company had received, for the payment of a creditor—

A. Yes.

XQ. (Continued.)—you didn't pay that creditor when you were using the money yourself, belonging to the company?

A. No, sir.

XQ. Until he pressed for payment?

A. No.

XQ. And when he pressed for payment, if you didn't have the money yourself to put it back again into the treasury of the company, you took from the company some more money to pay that pressing creditor the money due him?

A. Yes, sir; that is true.

XQ. And in that way you, probably, did return a great deal of the money which you had taken from the company at various times?

A. Returned to the company?

XQ. Yes.

A. The money I had taken?

XQ. Yes.

A. There were some times. I was in debt to the company—I call it a debt—the money I took was never reduced, but always rather increased, but there were times when I did place money into the company's bank, if the company was short.

XQ. To meet the claims of the pressing creditors of the company?

A. Yes, sir.

XQ. And so you went on using more and more?

A. Yes, sir.

XQ. Of the company's money?

A. Yes, sir; but at times I would return something.

XQ. But you kept bills of any unfortunate creditor of the company paid by money which you returned?

A. Yes, sir.

XQ. And if you did not do it that way, you took the money which the company had to pay some other creditor whose claims were not yet due?

A. Possibly, yes. I don't know that such a thing as that occurred, but it is possible that it might have occurred.

XQ. That is about the system you pursued?

A. Yes, sir; that was about the system.

XQ. By working that system you succeeded in getting about a million dollars from the company, didn't you?

A. Oh, no.

XQ. About how much before you left? About how much of the funds of the company had you extracted?

A. Something over six hundred thousand dollars in bonds.

XQ. From various sources you had taken between six hundred thousand and a million dollars from this company?

A. Yes, sir; but it did not reach a million.

XQ. It didn't reach a million?

A. I don't think so. No, it did not. I know I gave a statement there, but I don't know whether it still remains of the exact amount. As far as I could remember I left a statement of the amount there when I left.

XQ. When you left the country, you left behind you a confession, didn't you?

A. Yes, sir; stating the amount.

XQ. Stating the amount, and stating, I suppose, truly the condition of your books and everything about your embezzlement?

A. As far as I could, yes, sir.

XQ. And that that was a statement of what was the true condition of the liabilities, so far as the books will show, of the Canal Company when you left it?

A. I don't think that I included the debts to the United States, for I never supposed they would be called upon, in that confession that I made. In that statement that I made I don't think I included the debts to the United States. I am sure I didn't. The state-

ment I made included the bonds, the cash on hand and the securities that were held in the different funds.

XQ. I understood you to say you never supposed you would be called upon to pay that dividend?

A. No, sir; I didn't suppose that would be called upon, or that question would be called up, about the payment of those three dividends. I was going to say—although it is a repetition of what I have said before—that that statement which I made was made of the bonds, the amount in bank and the securities in the various trust funds.

XQ. I am reading from a copy of your confession, and will ask you whether it is correct:

All the books as far as I know, are correct, and will show things exactly as they are. The cash book and ledger are in balance and correct, except that the money represented is not all there. The stock ledger is all right in every way, and foots up correctly, unless there happens to be a clerical error somewhere. The loan ledger balance agrees with the amount on the sheets and interest books and shows the exact amounts on loan outstanding and who holds it.

That is what you said at that time, isn't it?

A. Yes, sir; that is correct.

XQ. You have referred to Mr. Eyster, the Assistant Treasurer, who received those dividends for the United States Government. Is he a friend of yours?

A. A friend of mine?

XQ. Yes.

A. No, sir. I have only seen him once or twice.

XQ. Have you ever known him?

A. He came there to the office on two or three different times, and signed the book, but I paid no more attention to him than I did to hundreds of others who came.

XQ. You didn't know him in any other way?

A. I didn't know him in any other way. Never

spoke a word to him, except to give him a check and take his signature.

XQ. Your testimony was taken by deposition a year or two ago, wasn't it?

A. Yes, sir.

XQ. Do you remember saying then there was a third person working with you in taking this money whose name you did not care to reveal?

A. Yes, sir.

XQ. Have you kept that secret for forty-three years?

A. I kept it a secret?

XQ. Have you kept secret the name of that man who was working with you?

A. I have already told you today who the party was.

XQ. Is that the man whose name you told us quickly today?

A. Wymer Bedford, yes, sir.

XQ. Why was it that you wanted to keep that name secret until this time?

A. For Wymer Bedford's sake; for his memory's sake. He is dead.

XQ. How long has he been dead?

A. He has been dead for nine or ten years.

XQ. Why was it that in your deposition you were so careful to tell us that the man who was in league with you was not an officer of the United States, and you wanted, particularly, to impress upon us that fact, didn't you?

A. Only because the question was asked me over and over again, "Was there any one connected with the United States in with me?"

XQ. In other words, you didn't volunteer that information, did you?

A. No, sir.

XQ. I am reading from your deposition to which I have heretofore referred:

"Q. By whom was this particular paper prepared, if you recall? A. I could not say in whose handwriting it is, but it was prepared by Mr. Leslie, or myself, or perhaps by a third party who was cognizant of the transaction; but no one connected with the Government in any possible way."

A. Because that question had been asked me.

XQ. Not asked you, you mean, until afterwards?

A. It had been asked me, but it may have been he might meant to state that Mr. Eyster had nothing to do with it for the reason that I had been called upon some years before by some gentleman, whom I did not know, to inquire how Mr. Eyster's name came on that thing, that is, on that paper; and I told him, that is, the gentleman, at the time—I was then employed in book-keeping by the Thompson firm—and I told him——

XQ. When are you referring to? What period now?

A. I think about 1898 or 1899; somewheres about there.

XQ. I am not asking you about that conversation. I don't know anything about it, and I don't care to have you repeat it, because I don't know who you have been talking to. That is not evidence here. I am asking you about your deposition.

A. Evidently there had been some question raised as to Mr. Eyster having signed the paper, and I assured that gentleman——

XQ. I don't care. We can't have what conversation you had with some stranger. I am asking you what you told us when we took that deposition.

A. I told you just that thing.

XQ. Just what I have read to you?

A. Just what you read to me.

XQ. You say you had no fear, whatever, of the Government making any claim for this dividend while you were there. That is true, isn't it?

A. Yes, sir.

XQ. Why?

A. I don't know why.

XQ. That is your own imagination, is it?

A. Simply a question of imagination, yes, sir.

XQ. That although you had been paying them forty-five thousand dollars a year you had no fear that they would come and ask you to continue that payment after you had published that a dividend had been declared of that amount?

A. That after the lapse of one or two years from the publication of it, as they had never come without notice,—as far as I know they had never come without being given a notice—and after a lapse of two years and they had not come, I dismissed the fear of that from my mind, that the United States would ever notice it, because of the change in the Administration.

XQ. With whom did you divide this six hundred thousand, or between six hundred thousand and a million dollars, or did you get that all yourself?

A. No, sir.

XQ. How was it divided? How many partners did you have?

A. Only Mr. Leslie and myself, so far as I know were concerned.

XQ. Did you make an equal division of that?

A. No, sir; not all.

XQ. About how much did you individually get?

A. Why, I couldn't say that at once. It was no great amount. If I might explain, I would say—

XQ. Will you answer my question first, and then explain afterwards?

A. I couldn't tell you that, sir, at all. I don't think the amount I actually received was over forty or fifty thousand dollars.

XQ. Then all the rest was divided up among your companions, was it?

A. No, sir.

XQ. The company, you say, lost between six hundred thousand and a million dollars?

A. Yes, sir.

XQ. And you only got forty thousand. Who got all the rest?

A. That is the question I was about to answer. Now that you have asked it, I will answer it. When a bond is sold it is sold at seventy cents, from seventy to seventy-two to seventy-three to seventy-four and sometimes as high as seventy-five, but rarely is that much, on the dollar, and every six months there is interest on each dollar, and all that had to be paid, and the interest was all paid. When it reached one hundred or two hundred thousand dollars of bonds, you can imagine how much went back to the payment of interest on those bonds, and the losses.

XQ. Can you state how you divided the money, that you took from this company, among your companions?

A. I had only one companion in the matter, and that was Mr. Leslie, so far as division of money was concerned. Mr. Leslie did what he pleased. I can't tell what he did with his money, or how much he took. I only know he took an enormous amount, large amounts, or considerable amounts, because he got into trouble outside of this trouble.

XQ. How many assistants did you have? You say you had but Mr. Leslie and yourself in the transactions. How many people assisted you in carrying on this robbery of the company?

A. No one except Mr. Bedford, as a friend, who was cognizant of the fact that I had taken money. Mr. Leslie and I had taken money, and he assisted me in hiding the matter as an act of friendship.

XQ. Don't you know that some officer of the Government got some of that money?

A. I am as certain as possible that no one connected with the Government got any of it, in any way.

XQ. That is, so far as you are concerned?

A. So far as I am concerned.

XQ. You don't know how much Mr. Leslie distributed among the Government officials?

A. I can't say anything about that. I can't speak for him.

XQ. Or you don't know whether Mr. Leslie paid this whole dividend of 1873, 1875 and 1876, to the Government, do you, before you left? You don't know what he did?

A. I know he didn't pay it out of the funds of the company.

XQ. But you don't know whether he paid it out of his own funds which he took?

A. No, sir.

XQ. You don't know that?

A. No, sir.

XQ. He may have done that?

A. I do not see how he could possibly do it, or where he would get the money to do it with.

XQ. I am speaking of out of the funds which he took from the company of over six hundred thousand dollars?

A. No, sir. Some of it I know just exactly where it went; to lawyers and others.

XQ. They have spoken here about what happened to you afterwards. The Canal Company, the defendant here, went after you, got you back and sent you to jail?

A. Yes, sir.

XQ. Mr. Wilson, you have mentioned that the only time you saw Mr. Eyster was when he came to the office to sign the dividend book. I cannot find Mr. Eyster's name on that dividend book, in any place. Can you tell me where it is? What year did you see him come there, to sign the dividend book?

A. I know Mr. Eyster was there once or twice. I said I saw Mr. Eyster. I suppose he had signed it quite a number of times, but I cannot recall more than once or twice having seen him, and then only by his coming in. I recollect just the fact that Mr. Eyster was there, because the name struck me as being a peculiar one.

XQ. Did you ever see him sign the dividend book?

A. I cannot recall it at all. If he did, his name would be on the dividend book, of course.

XQ. He signed that generally by a deputy, did he not, who came there and signed the receipt and then you gave him a check for the dividend?

A. I know that was usually done, but I have an impression—I am very sure, he came there once about the matter—though I could not say with any certainty. I only know that I don't remember him at all. I couldn't tell what kind of a man he was, although the name is on my mind very strongly.

XQ. He never entered into your calculations?

A. Not at all.

XQ. You went ahead regardless of what he might do?

A. Entirely. Knowledge was kept from him as carefully as it would have been from any other person.

XQ. What did you do besides what you have told us here; anything more?

A. I beg your pardon. I do not understand your question.

XQ. Did you, in 1873, or in any of those three years, do anything more than you have already told Mr. Nields you were doing?

THE COURT: Do you mean in the way of misappropriating funds?

XQ. (Continued.) Misappropriating or stealing?

A. There were bonds sold after that, after 1873.

XQ. You continued to take money until you left in 1886. There is no doubt about that, is there?

A. Not at all; but I continued to carry, or pay interest on the bonds and sell bonds in order to get the interest.

XQ. When did Mr. Eyster die?

A. I have no idea. I did not know he was dead until this gentleman called on me about a year ago, and told me that he was dead.

XQ. Then it was some gentleman from Mr. Eyster who came to see you, was it?

A. I don't know who he was. I suppose he was a relative.

XQ. A relative of Mr. Eyster's?

A. I suppose so.

XQ. Did he describe how Mr. Eyster died?

A. No, sir; nothing at all.

XQ. Did you know?

A. I did not.

XQ. He came to see you about this matter, did he?

A. He came to see me about it.

XQ. Were you convicted of forgery and conspiracy to defraud? Was that what you were convicted of?

A. That I cannot tell. The indictment will show that, but I don't know.

XQ. You mentioned that you thought it was conspiracy to defraud. Just from the memorandums I have it looks as though it was forgery and conspiracy to defraud. Is that right?

A. I can't tell you. I don't know. All I remember is that the charge was conspiracy. My lawyer asked me if I would plead guilty to the charge of conspiracy, and I said, "Yes".

XQ. Do you remember this gentleman asking you about your relations with Mr. Eyster; this gentleman who came to see you?

A. About my relations with him, no, sir.

XQ. Do you remember what he said about your relations with Mr. Eyster?

A. Yes, sir. I can tell you almost his words. He said, "Mr. Wilson, Mr. Eyster's name is connected with some of the frauds on the Canal Company." I told him that Mr. Eyster had nothing to do with it. He said that Mr. Eyster was an elderly gentleman of unblemished fame, and he thought it would be a terrible thing to have any stain upon his name. I told him that Mr. Eyster had nothing whatever to do with it; had no knowledge of it; that if anything came of it, I would testify for Mr. Eyster and save a man who had done no wrong, even if it came to a confession myself.

XQ. Even though you had to make a confession yourself, you would defend him?

A. Yes, sir; simply because he was an honest, true man, and I believed he was, and he had no possible connection with the fraud.

XQ. Is this the whole conversation you have given us?

A. The whole conversation. He thanked me and went away.

XQ. And didn't say anything further to you?

A. Every one who has spoken to me about it I have told that circumstance to. It was on my mind when the thing came on. It has always been on my conscience and feeling that I must defend Mr. Eyster, because I have reason to believe he was an honest man, thoroughly honest, and I knew he could have no knowledge, in any way, of those transactions.

XQ. What reasons are you referring to?

A. What reasons?

XQ. Yes.

A. Of his character and standing.

XQ. Have you any personal knowledge?

A. None at all. Nothing except what this gentleman said.

XQ. He stood very high in the financial world, did he not?

A. He did.

XQ. He did?

A. I presume he did by the position he held.

XQ. And he was Sub-Treasurer from 1868 until his sudden death, was he not?

A. I don't know how long he was there. I know he had been.

XQ. Do you know when he died, Mr. Wilson?

A. I do not. Except it must have been prior to that time when the gentleman was there.

HARRY H. WITMAN.

HARRY H. WITMAN, a witness having been previously sworn and now recalled, on behalf of the United States, testifies as follows:

By Mr. NIELDS:

Q. Have you the various records of the Appointment Division of the Treasury Department showing who were the Assistant Secretaries of the Treasury in the year 1875?

A. Yes, sir.

Q. Will you produce that record?

A. Yes, sir.

Q. Will you state what appears upon this record, showing who were the Assistant Secretaries in the year 1875?

(Question withdrawn, on account of objection having been made by Mr. C. Biddle.)

Q. Does that list contain all who were Assistant Secretaries of the Treasury?

A. Yes, sir.

Q. In 1875?

A. Yes, sir.

Q. How many men are Assistant Secretaries of the Treasury?

A. Two.

Q. Is there any person by the name of "A. V. Holmes"?

A. No, sir.

Q. Who is Assistant Secretary, or was Assistant Secretary, in the year 1875?

A. No, sir.

Q. Or at any other time in the history of the Government?

A. At no time.

Q. In the year 1877, have you a record of that year?

A. Yes, sir. You will find it on that same page.

Q. Will you look at this page and see whether or no, during the year 1875, Charles W. Hayes was Assistant Secretary of the Treasury?

A. He was not.

Q. Was any person of that name ever Assistant Secretary of the Treasury?

A. Never.

Q. I will ask you in regard to the year 1877, Mr. Witman. Was Charles W. Hayes an Assistant Secretary of the Treasury in the year 1877?

A. No, sir.

Q. Or at any other time in the history of the Government?

A. No, sir.

Q. Was there a Presidential appointee of that name?

A. Never.

Q. Either of the name A. V. Holmes or Charles W. Hayes?

A. No, sir.

Q. Have you an entire list of the Presidential appointments?

A. Yes, sir.

MR. NIELDS: I ask your Honor to take judicial notice of that book. All these Assistant Secretaries are Presidential appointments.

Q. Will you produce that book?

A. Yes, sir. Here is a book. It is a nomination book, where all presidential appointments are made. The name is entered, the day the nomination is made, the day it is sent to the Senate for confirmation, when it is returned and sent to the White House for approval and returned to the Department.

Q. Do the names of "A. V. Holmes" or "Charles W. Hayes" in the year 1875 to 1877, inclusive, or at any other time, appear in that record?

A. They do not.

Q. As Assistant Secretary of the Treasury, or in any other capacity?

A. In no capacity whatever.

Q. The Court has asked as to the name "J. F. Hartley". Was such a person an Assistant Secretary of the Treasury?

A. Yes, sir.

Q. Was he so in the year 1871?

A. The book would show that. Hartley's name first appears in 1865.

Q. And continues until when?

A. He was in and out at different times. In 1865 to 1875.

Q. Between the years 1865 and 1875?

A. Only.

Q. J. F. Hartley was an Assistant Secretary of the Treasury?

A. Yes, sir.

Q. And as such was an Acting Secretary?

A. Could be in the absence of the Secretary.

Q. Have you any other books showing whether or no, such persons were Assistant Secretaries of the Treasury?

A. No other. It would have to be in here.

Q. Have you a list of the employees of the United States, of the office of the Assistant Treasurer at Philadelphia?

A. Yes, sir.

Q. Will you turn to that book and tell us where it is and what it is?

A. This is a book which is a record of all the employees in the various Sub-Treasuries all over the country. In the Philadelphia office the first name, the Assistant Treasurer, which is a Presidential appointment, is generally put at the head, that is, at the head of the office. That is the only Presidential appointment in that office; and then runs the various employees as their grade classes them.

Q. Was there a person by the name of William Y. Beale employed at the office of the Assistant Treasurer, in Philadelphia, in the year 1874 to 1877?

A. At no time.

Q. At no time?

A. At no time does his name appear in either of these places at all.

(At 4.20 o'clock P. M. adjournment was had until Thursday, January sixth, 1916, eleven o'clock A. M.)

Wilmington, Delaware,

January 6th, 1916.

11.00 o'clock A. M.

MR. GRAY: Mr. Charles Bye, of the Charles Warner Company, just a few minutes ago, told

me that he had received a message that Mr. Watkins, one of the jurymen, is sick in Philadelphia.

THE COURT: The Court has just received the following telegram:

"Philadelphia, Pa., 10.30, January 6th, 1916.
Judge Bradford,

United States Post Office Building,
Wilmington, Del.

Mr. J. W. Watkins ill in bed with severe attack of influenza and under my care. Impossible to appear in court today.

Dr. E. W. Kelsey."

If it is a severe attack of influenza, while he states it is impossible for him to appear in court today, I think we might safely infer that it would be impossible for him to appear in court this week.

MR. C. BIDDLE: Yes, sir.

THE COURT: Under those circumstances, are you both satisfied, or are all of you satisfied, to go on with eleven jurors?

MR. NIELDS: Yes, sir.

MR. C. BIDDLE: Yes, sir.

THE COURT: Then, gentlemen, we will proceed with the case.

HARRY H. WITMAN.

HARRY H. WITMAN, a witness on behalf of the United States, again taking the stand, his examination in chief is continued as follows:

MR. NIELDS: I have no further questions at present.

NO CROSS-EXAMINATION.

FRANK G. COLLINS.

FRANK G. COLLINS, a witness on behalf of the United States, having been previously sworn, and now recalled, testifies as follows:

By MR. NIELDS:

Q. You have already stated to the Court and jury who you are, Mr. Collins, have you not?

A. I have.

Q. Will you kindly reiterate that so that we will have that fresh in mind?

A. My name is—

MR. C. BIDDLE: What is the use of having this gentleman state that over again? I have made no cross-examination or no objection; so why repeat it?

THE COURT: It does not do any harm to state it several times and let it go on.

Q. What is your position?

A. I am custodian of all the distinctive papers of the United States; also the custodian of the New Federal Reserve notes.

Q. How long have you been in the Treasury?

A. Since June fifth, 1874.

Q. Mr. Collins, have you searched the files of the Treasury Department for notices of dividends declared and paid to the United States by this defendant?

MR. C. BIDDLE: I object. I do not think it is evidence in this case what this gentleman has done. It is what the records do show, and not what they do not show. I have no objection to his bringing in anything this gentleman finds. If he is going to try and bring in evidence as to what this gentleman does not find, that is another proposition.

Q. What have you found, or what did you find?

A. Shall I answer your question?

MR. NIELDS: I will withdraw the question.

Q. What have you found in the files of the Treasury Department?

A. I have found letter press copy books relating to dividends declared by the Chesapeake and Delaware Canal Company in favor of the shares of stock owned by the United States. I have also found the declarations notifying the Secretary of the Treasury of the same.

Q. Will you produce those notices?

A. Yes, sir.

Q. Where did you get this paper?

A. I got this from the official files of the Division of Loans and Currency of the United States, office of the Secretary of the Treasury.

Q. What are they?

MR. C. BIDDLE: I object.

MR. NIELDS: I offer these notices in evidence.

MR. C. BIDDLE: I think they are objectionable as being irrelevant and improper and hearsay.

THE COURT: What is your position, exactly, in regard to this matter?

MR. NIELDS: The testimony in regard to a part of the concealment of the abstraction of the monies, so that these checks to the United States were not paid, was that no notices were sent to the United States. I want to confirm that by showing that there are no entries on the official files of the United States of any such notices; and further, that the files show, with reference to all dividends received by the United States, a record of a notice from the Treasurer of the Chesapeake and Delaware Canal Company, that dividends had been declared and the amount was

subject to the order of the Secretary of the Treasury, showing that the Government has a full and complete record of all notices received, and no notices with reference to the three dividends sued for in this case.

THE COURT: What is your objection to that?

MR. C. BIDDLE: My objection to his present offer, which is the offering of these papers, is that they are irrelevant, improper and hearsay.

THE COURT: Coupled with the explanation of Mr. Nields, the Court thinks they are admissible, and rules them in.

(Exception noted for defendant.)

(The entire lot of notices are admitted in evidence, subject to the objection, and marked "Government's Exhibit No. 67".)

Q. I observe that these notices include the years 1867 to April thirtieth, 1873, inclusive. Have you letter press copies of the first two drafts of the Secretary of the Treasury for dividends Nos. 1 and 2 that the Government actually received?

A. I have.

Q. Produce them.

MR. NIELDS: I offer in evidence this letter press copy of a draft of September thirteenth, 1853, reciting the receipt of a notice from Peter Leslie, Treasurer of the Chesapeake and Delaware Canal Company.

MR. C. BIDDLE: The same general objection is made to the admission of this press copy.

THE COURT: Is it your object to show from the official records the uniform course of dealing?

MR. NIELDS: Undoubtedly.

THE COURT: In all other years than the three?

MR. NIELDS: Precisely.

THE COURT: I think you have a right to do it.

(Exception noted for defendant.)

(Paper writing, letter press copy, admitted in evidence, subject to objection, and marked, "Government's Exhibit No. 68"; this letter press copy being found on page 226 of the letter press book.)

MR. NIELDS: I offer the particular page and not the whole book to go in, and agree that a copy of the page shall be entered on the record here.

I also offer in evidence letter press copies of letters from the Treasury Department between July first, and December thirty-first, 1866, being a copy of the draft No. 2, which recites the receipt of a notice from Henry V. Leslie of the declaration of a dividend.

MR. C. BIDDLE: I object on the same grounds as before stated.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

(Paper writings, letter press copies, admitted in evidence, subject to the objection, and marked, "Government's Exhibit No. 69"; these letter press copies being found on page 224 of the letter press book.)

Q. Have you searched the records of the Treasury Department for like notices for dividends declared in June, 1873; June, 1875; and June, 1876?

A. I have.

Q. Is there anywhere in the files of the Treasury, any record of a notice from the treasurer or secretary of the Chesapeake and Delaware Canal Company, showing the receipt of this notice, or the notice itself?

MR. C. BIDDLE: That is highly improper, and I object to it.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

MR. NIELDS: I will withdraw the last question.

Q. You have been in the Treasury Department since 1874?

A. Since 1874.

Q. What are your official duties, and what have been your official duties since 1864?

A. Since 1874?

Q. Since 1874? Excuse me.

A. In 1874 I was appointed temporary clerk in the Treasury Department. Then I advanced through all of the grades—do you want all the detail?

MR. C. BIDDLE: No.

A. (Continued.) I advanced through all different grades of the Division of Loans and Currency until I became Assistant Chief in 1907. In 1911 I was appointed Custodian of Paper, that is the distinctive paper of the United States upon which all the Government securities are printed. On the first of July, 1915, I was appointed Custodian, in addition to my other duties, of the New Federal Reserve notes that are now being circulated.

Q. Are you the custodian of such papers as these papers you have produced?

A. No, sir.

Q. Who is the custodian of the Division of Loans and Currency?

A. The Chief.

Q. Are you familiar with the files of that office?

A. I am.

Q. In the examination of the files, where did you get these?

A. I obtained these from a tin box that was kept in the safe of the Division of Loans and Currency, together with the certificates of stock that had been in that receptacle as far back as I can remember.

Q. Did you, in the appropriate place, hunt for other like notices?

A. I did. They were kept in a jacket similar to other cases.

Q. In the appropriate place for the custody of notices of this kind did you find notices for dividends declared by the Chesapeake and Delaware Canal Company in 1873, 1875 and 1876?

MR. GRAY: I object, on the same grounds.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

A. I did not.

THE COURT: The reason why the Court is of the opinion that this evidence is admissible, is that these are official documents, kept by a department of the Government, and there is the prima facie presumption of regularity prevailing, and there is a further presumption that public officers have duly performed their duty, and that if a paper was received by those public officers it would be properly filed; and, therefore, when you show that there is no trace of a paper, which is of a character that should have been filed there, it is evidence for what it is worth. Upon both of those grounds it seems to the Court that this evidence is clearly admissible.

MR. NIELDS: For the orderly presentation of my case I would this witness to step aside for the present. The learned counsel shall have the fullest opportunity of cross-examining, or shall do it right now, if they wish.

MR. C. BIDDLE: My only request is that you complete the testimony of a witness when you put him on the stand. There is no cross-examination of this witness.

(The further examination of this witness is suspended for the present.)

MICHAEL J. O'REILLY.

MICHAEL J. O'REILLY, a witness having been previously sworn, and now recalled, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. I think it was on Tuesday that the Court stated that it would like to understand the function of drafts, as disclosed by the evidence in this case; how the drafts, introduced in this case, were used, and how the dividends, actually paid, have been paid through drafts; in order that the Court and jury may be advised of exactly the significance of these papers.

Mr. O'Reilly, I hand you this evidence of payment of the defendant, which is a voucher dated October twenty-sixth, 1874, which the Government has endeavored to show to this jury is the draft for 1871. Will you state how the draft of 1871 was used in this case, in the matter of the conduct of the business between the United States and the Chesapeake and Delaware Canal Company?

A. Perhaps I should ask if the purpose is to have me take up the course which began with the receipt of the notice?

Q. Yes, certainly.

A. May I have that paper?

Q. Yes. Will you explain the *modus operandi*?

A. On the receipt of this paper, which I understand is in evidence, the Treasury Department proceeded to draw a draft.

Q. What department are you speaking of?

A. I am speaking now of a notice written on a letter head, reading "Office, Chesapeake and Delaware Canal Company, 417 Walnut Street, Philadelphia, October twenty-fifth, 1871."

Q. That is one of the notices produced by Mr. Collins?

A. Yes, sir; addressed to Honorable George S. Boutwell, Secretary of the Treasury, Washington, D. C., and signed "Respectfully yours, Henry V. Leslie, Treasurer."

By THE COURT:

Q. He states the fact of the dividend and the amount?

A. Yes, sir. "The Proprietors of this Company have declared a cash dividend on the outstanding capital stock of the company of one dollar and fifty cents per share. The amount due the United States Government is twenty-one thousand nine hundred and thirty-seven dollars and fifty cents. This sum is now subject to your order, either by sight draft, or otherwise. Respectfully yours, Henry V. Leslie, Treasurer."

Q. What was the order of events after that? What was done next?

A. The Secretary of the Treasury then drew a draft upon Henry V. Leslie, Esquire, Treasurer, of the Chesapeake and Delaware Canal Company, reading as follows:

"At sight, please pay to George Eyster, U. S. Assistant Treasurer at Philadelphia, or order, for deposit to the credit of the Treasurer of the United States, the sum of twenty-one thousand nine hundred and thirty-seven dollars and fifty cents, being dividend on stock in the above named company held by the United States. J. F. Hartley, Acting Secretary."

At the same time a letter was written to the Assistant Treasurer. I am speaking now of the general course that was followed in this case.

Q. Written by whom?

A. By the Department and signed similarly, "J. F. Hartley, Acting Secretary," addressed to the Assistant Treasurer of the United States in Philadelphia,

enclosing to him for collection the draft which the Department had prepared and drawn upon the Treasurer of the Canal Company. On receipt of that draft, at the office of the Assistant Treasurer at Philadelphia—I might say that there were—although I am not prepared to say it was uniformly done, or that it was done invariably, but that it was generally done—a notice sent on the same day to Henry V. Leslie advising him of the drawing of the draft and the authorization of the Assistant Treasurer in Philadelphia for collection. On receipt of the draft at the office of the Assistant Treasurer at Philadelphia, presumably it was presented to the Company, and on the date of his presentation and the receipt by the Assistant Treasurer of the amount of the dividend, he would issue two certificates of deposit certifying that he had received the amount of that dividend as described, as representing money which was a dividend of the Chesapeake and Delaware Canal Company. Those certificates of deposit the Assistant Treasurer at Philadelphia, would transmit to the Secretary of the Treasury, and at the same time he would prepare, or he would make an entry in his daily transcript of receipts at the office of the Assistant Treasurer at Philadelphia, in which the amount of the draft which he had collected—which sometimes was described specifically with date of the letter and date of the draft—would appear.

By MR. BIDDLE:

Q. What would you call that?

A. A daily transcript of the accounts. I might explain that, that the situation is this: That all of the monies received by the Assistant Treasurers, throughout the United States, whether in Philadelphia, or elsewhere, are deposited to the credit of the Treasurer of the United States, because all public monies are subject to his draft, and, therefore, monies deposited in all

of these places are placed to the Treasurer's credit, and the Assistant Treasurer reports that as money received in account with the Treasurer of the United States. That is the character of the daily transcript to which I have just referred.

On receipt of the daily transcript at the Department and of the certificates of deposit, they were checked together to see that there was no omission from the daily transcript of any certificate of deposit which had been issued at any of the depositaries. That being verified, the certificates of deposit were made the basis of a list, known as a deposit list, that was prepared in the Division of Public Monies and forwarded to the Division of Bookkeeping and Warrants. At the time of this occurrence the division was known as the Division of Warrants, Estimates and Appropriations. On receipt of the deposit list containing the fund set out in the certificate of deposit, that Division of Warrants, Estimates and Appropriations prepared a warrant which is known as a covering warrant, a formal cover for money into the Treasury for charge against the Treasurer of the United States. That fixed his accountability to the United States for monies received. Those warrants were registered in a register of the Division of Warrants, Estimates and Appropriations and passed over to the Division of Public Monies for notation by them of the number and date of the warrant which took up and covered into the Treasury the amount represented by the various certificates of deposit. After the preparation of this warrant, it was signed by the Secretary of the Treasury, passed by him to the Comptroller of the Treasury, who is required by law to keep a duplicate set of books containing these matters, and he countersigned the warrant. The warrant then passed from the Comptroller to the Treasurer of the United States, who acknowledged at the bottom of the warrant, the receipt of the sum of money named

in the warrant. A warrant should show for each specific particular payment that was made. The Treasurer then, at the expiration of the quarter in which these transactions occurred, prepared for submission and audit by the auditor of the Treasury Department, his accounts of all monies received by him within the quarter, and also containing a claim for credit for all pay warrants that he had paid, money that he had disbursed within the same period. That account was made up and bound in book form and transmitted by the Treasurer to the Auditor for the Treasury Department for examination and audit. On that the Auditor examined and settled the account and made a certificate of his balance due to the United States, based upon the warrants issued by the Secretary of the Treasury. The Treasurer's account, by entering the warrant account, was charged with all monies going into the Treasury by a covering warrant and credited with all warrants which he paid, that was issued by the Secretary of the Treasury and drawn upon the Treasurer of the United States.

By MR. NIELDS:

Q. Were all the fourteen dividends paid upon draft such as you have described?

A. All were so paid.

MR. C. BIDDLE: Only speak of what you know.

A. (Continued.) I know it from examination of the accounts and records. Of course, not from personal knowledge. All of the fourteen dividends were paid upon drafts drawn by the Treasury Department and sent to the Assistant Treasurer at Philadelphia for collection, with the exception of the second dividend, which was treated in a slightly different way. In that case, the Department having been advised of the declaration of a dividend in 1866, there having been none declared between 1853 and 1866, immediately instructed Mr. Leslie to deposit that amount with the Assistant

Treasurer at Philadelphia; and that transaction was carried out in that manner, the letter of instructions being considered and accepted as a draft.

Q. Is this course of accounting prescribed by the statutes of the United States?

A. It is.

Q. One of the evidences of payment produced by the defendant company is a letter dated November nineteenth, 1875, which reads as follows:

“November nineteenth, 1875.

Sir:

I am directed by the Secretary to acknowledge the receipt of your letter of the 17th instant containing check for fourteen thousand six hundred and twenty-five dollars, being for a dividend on the stock of the Chesapeake and Delaware Canal Company, now owned and held by the United States.

Very respectfully,

A. V. Holmes,

Assistant Secretary.

\$14625

To Henry V. Leslie, Esquire,

Secretary and Treasurer,

Chesapeake and Delaware Canal Company,
Philadelphia.”

I ask you, Mr. O'Reilly, whether or no you know where such a check and letter would be received, or know a record would be there made of their receipt?

MR. C. BIDDLE: I object to the form of the question, as the counsel mistakenly has stated that this was produced by the defendant company. It never was produced by the defendant, at any time. This is a paper which he, himself, found among our records, and has produced it in Court himself. We have not produced it.

MR. NIELDS: The learned counsel representing the Canal Company has not on one occasion, but on numerous occasions, stated its objection to the

introduction by the Government of these vouchers, or receipts, which purported to show payment to the United States, on the ground that it is a part of their defense. Your Honor said it was admissible to rebut the presumption arising from lapse of time and as evidence of non-payment.

MR. C. BIDDLE: Counsel for the Government first says we have objected to producing it, and then he turns around and says have produced it. We have not produced it.

MR. NIELDS: Upon subpoena it was produced, because it was objected to as part of their defense.

THE COURT: Can't you change your question so as to eliminate the *casus belli*, so to speak?

(At the request of the Court the stenographer here read the last question propounded to the witness.)

Q. I will amend that question so as to use the words "produced under subpoena".

THE COURT: Cannot you succeed in reaching the result you are after by eliminating the descriptive portion of your question?

MR. NIELDS: Yes.

THE COURT: If your question refers to that paper having been produced under subpoena, does it not answer all practical purposes?

MR. NIELDS: Yes, sir; it does.

Q. In Government's Exhibit No. 11, which purports to be a letter signed by the Assistant Secretary of the Treasury, Washington, it is recited in this letter to Mr. Leslie, that he, the Assistant Secretary of the Treasury, had received a letter from Mr. Leslie, dated November seventeenth, 1875, containing a check for fourteen thousand six hundred and twenty-five dollars. Did you examine the appropriate place to learn whether or not in the Treasury there had been

received, by the Assistant Secretary of the Trasury, from Mr. Leslie, such a letter and check?

MR. C. BIDDLE: Did he find such a letter and check? Is that the only question he wants. He can only say whether he found it. He cannot state whether the Secretary received it.

THE COURT: I think that is absolutely unexceptionable.

A. I made an examination in all appropriate places where records are made in the office of the Secretary of the Treasury of the receipt of letters and papers, and found no record of the receipt of such a letter enclosing such a check as is set forth in this letter.

Q. Had such a letter and check been received, what record would have been made?

MR. C. BIDDLE: I object to that.

THE COURT: The objection is sustained. You can ask him what record should have been made.

Q. What record should have been made?

A. There would have been at least two separate and distinct records made of it. One in the Division known as Mails and Files, where the mails are received and distributed to the various Divisions.

By MR. BIDDLE:

Q. There should have been?

A. Yes, sir; should have been. I said there would have been, meaning that. That is my intention, to convey that. The Division of the Secretary's office where the letter would be sent, if received, for action, would also make a record of its receipt in index books that were known as "Indexes of Letters Received at the Treasury Department".

Q. What other records should there have been of it?

A. If such a check were received the record would disclose a reference of it to the Treasurer of the United

States for collection and deposit of the money in his account and issue of certificate of deposit therefor.

Q. Did you, or not, examine those records that you have testified to?

A. I did.

Q. Was there any record of the receipt of such a check by the Secretary of the Treasury of the United States from Leslie?

A. There was not.

Q. Had such a check been received—

A. Had such a check been received it should have passed through the Assistant Secretary and the Assistant Secretary's office and by him been formally referred for collection and debit and credit in the manner which I have just stated.

CROSS-EXAMINATION.

By MR. BIDDLE:

XQ. How long did you tell us you had been with the United States?

A. Twenty-one years.

XQ. Twenty-one years?

A. Yes, sir. A little more than that.

XQ. Mr. O'Reilly, in all those years did you know of any dividend upon any stock being collected in Philadelphia, except the dividend upon the Chesapeake and Delaware Canal Company's stock for the United States?

A. For the United States?

XQ. Yes.

MR. NIELDS: I object. Is this in cross-examination?

MR. C. BIDDLE: It is.

MR. NIELDS: I haven't the slightest objection.

A. I never had the question raised in respect to any dividend that might have been paid until the year 1911, when I began an investigation and examination

as to the payments of dividends by the Chesapeake and Delaware Canal Company.

XQ. Do you know of any other dividend being collected on stock through the office in Philadelphia?

A. I have made no examination myself.

XQ. Do you know of any?

A. I do not. I have not examined any records with that view.

XQ. You know the records in the Department in Washington. From how many different companies does the United States collect dividends upon stock?

A. In Philadelphia?

XQ. Anywhere.

A. I cannot, at this moment, recall any except the Chesapeake and Delaware Canal Company.

XQ. Excepting the Chesapeake and Delaware Canal Company?

A. Except this: I was going to add, if it is permissible—I do not want to inject this into my answer—

THE COURT: If you want to explain your answer—

A. (Continued.) I think I have said all I care to.

RE-DIRECT EXAMINATION.

By MR. NIELDS:

RQ. Have you anything in mind that might assist us? If not, that is the end of it.

A. Nothing directly on the question of the Chesapeake and Delaware Canal Company.

RQ. That is all we are inquiring about.

A. No, sir; nothing.

A JURYMAN: I would like to ask if it was the duty of any special officer of the United States to look after the collection of any dividends upon stocks owned by the United States? Is that permissible?

MR. NIELDS: I think it should be thoroughly understood, it having been laid down by this Court in the first trial, and your Honor's opinion having been affirmed by the Circuit Court of Appeals, and the Supreme Court, and the law being thoroughly settled, that the Government is not visited by laches of its agents.

THE COURT: That goes without saying, and the Court will charge the jury at the proper time that the carelessness of the agents of the Government can afford no defense to this suit. What is involved in this suit is the presumption of payment, of the fact of payment resulting from the lapse of twenty years or more.

A JURYMAN: The Court has cleared the matter in my mind, so I do not now desire to ask the question.

FRANK G. COLLINS.

FRANK G. COLLINS, a witness having been previously sworn and now recalled, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Mr. Collins, do you know where the copy books of letters written by the Assistant Secretaries of the Treasury, in November, 1875, are kept?

A. I do.

Q. Have you examined copy books, in their appropriate custody, covering letters of the Assistant Secretaries in November, 1875?

A. I have.

Q. Have you those copy books here?

A. I have.

Q. Would copies of such letters as these, if they emanate from the Treasury Department, be made?

MR. C. BIDDEL: I object.

Q. (Amended.) Should they have been made?

A. They would.

Q. Was a copy of such letter made in the Treasury Department?

A. There was not.

Q. Did you find a copy of such a letter as this which I now hand you, signed "A. V. Holmes"?

A. I did not.

Q. Did you make search for such a letter?

A. I did.

Q. Thorough and exhaustive?

A. Yes, sir.

Q. Did you find any letters signed, "A. V. Holmes, Assistant Secretary"?

A. I did not.

Q. I have in my hands two papers obtained from the Chesapeake and Delaware Canal Company purporting to be evidence of payment of the dividend to the United States of 1876, dated November twenty-seventh, 1877, signed, "Charles W. Hayes". If a draft, such as purports to be shown by one of these letters and a letter such as purports to be shown here, had been signed by an Assistant Secretary of the Treasury, should there have been a copy made in the copy books of the Treasury Department of such draft and letter?

A. There would.

Q. Did you search for such letter?

A. I did.

Q. And draft?

A. I did.

Q. Is there a copy of such a letter or draft in the files of the Treasury Department?

A. There is not.

Q. Did you find it?

A. I did not.

Q. You did not?

A. I did not.

Q. This letter signed "Charles W. Hayes", recites the receipt by him of a letter of Henry V. Leslie, dated November eighth, 1877.

A. Signed by whom?

Q. Recites the receipt of a letter of Henry V. Leslie, dated November eighth, 1877. If such a letter of Henry V. Leslie's had been received by an Assistant Secretary of the Treasury, should it appear in the files of the Treasury Department?

A. It would.

Q. Did you search the appropriate places for such a letter?

A. I did.

Q. Did you find such a letter?

A. I did not.

Q. Were there any letters at all signed "Charles W. Hayes", anywheres in the files of the Treasury Department?

A. No; in the period that I searched, from 1873 to December thirty-first, 1877.

Q. You have been in the Treasury Department since when?

A. June fifth, 1874.

Q. Was there ever any such Assistant Secretary of the Treasury as Charles W. Hayes?

A. I never heard of him.

Q. Have you copy books covering the period of which you have testified here?

A. I have.

Q. Right here on this table?

A. Yes, sir.

Q. Before the jury and counsel on the other side, and accessible to them?

A. Yes, sir.

MR. NIELDS: I do not know how I could prove my case without introducing those books in evidence.

THE COURT: You have shown by this witness that those are the records of the United States, haven't you

MR. NIELDS: Yes, sir.

THE COURT: Without offering them in evidence, can't you tender counsel on the other side, those books for the purpose of being made evidence by them, if you see fit to do so?

MR. NIELDS: And for the purposes of examination and cross-examination.

THE COURT: Would not that answer all purposes?

MR. C. BIDDLE: I do not care to suggest anything to Mr. Nields, because he seems to be so careful; but I am satisfied with any ruling your Honor makes on the matter. If we want to examine the books, we can do so. Mr. Nields says that. I ask nothing further.

MR. NIELDS: I desire to use that before the jury, if necessary, in the trial of this case.

THE COURT: You had better offer them in evidence. Then if you want to use them before the jury, if they are admitted, you can do so. The only desire of the Court is that there should not be contention between counsel as to what is in evidence and what is not in evidence. Anything you agree to will suit the Court. The suggestion made by the Court—although I have no right to make the suggestion, would make it more convenient to counsel if you should tender to the counsel on the other side the fullest opportunity of examining those books and using them, in so far as they found it material. That would answer all practical purposes.

MR. NIELDS: I think it will.

Q. Mr. Collins put aside those books to which you have just testified.

NO CROSS-EXAMINATION.

MARY H. BRADY.

MARY H. BRADY, a witness, produced, sworn and examined, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Miss Brady, what is your official employment?

A. Clerk, in charge of the files for the Auditor of the Treasury.

Q. You have been connected with the Treasury for some while?

A. Yes, sir. I have been in charge since 1894. Previous to that time, I was Assistant in charge.

Q. Miss Brady, have you pay rolls showing who were the Assistant Secretaries of the Treasury?

A. I have those pay rolls, sir.

Q. In the year 1875 was any one by the name of "A. V. Holmes" an Assistant Secretary of the Treasury of the United States?

A. No, sir.

Q. What have you in your hands?

A. The pay roll for November, 1875, showing the two Secretaries, at that time, were Charles F. Conant and C. F. Burnan.

Q. At any time during the year 1875 was such a person as "A. V. Holmes" an Assistant Secretary of the Treasury?

A. There was not.

Q. Was there anybody in the office of the Secretary of the Treasury, in the year 1875, by the name of "A. V. Holmes"?

A. There was not.

Q. Is that true of the entire year 1875?

A. I think so; yes, sir.

Q. Have you the pay rolls covering the month of November, 1877?

A. November, 1877; yes, sir.

Q. Was there an Assistant Secretary of the Treasury, by the name of "Charles W. Hayes"?

A. There was not. The pay roll does not show that name. Shall I name the Assistants?

Q. Yes.

A. The Assistants, at that time, were, R. C. McCormick and Henry F. French.

Q. Was there any employee in the office of the Secretary of the Treasury named "Charles W. Hayes"?

A. There was not.

Q. Miss Brady, have you the pay rolls of the office of the Assistant Treasurer at Philadelphia?

A. Yes, sir.

Q. Will you produce them?

A. Yes, sir. Here are the pay rolls of the Assistant Treasurer of the United States, at Philadelphia, from 1874 up to 1886.

Q. From what custody did you obtain all those pay rolls?

A. The files of the Auditor for the Treasury, of which I am in charge.

Q. By whom are those pay rolls made up in the office?

A. In the office of the Assistant Treasurer in Philadelphia, and submitted to the Treasurer as his vouchers for compensation of the employees of that office.

Q. There appears the name of "William Y. Beale" as receiving, on behalf of the United States, on October thirtieth, 1874, payment of a draft to the Assistant Treasurer at Philadelphia for twenty-one thousand nine hundred and thirty-seven dollars and fifty cents. I will ask you whether or no William Y. Beale was an employee at the office of the Assistant Treasurer at Philadelphia?

A. He was not.

Q. In October, 1874?

A. No, sir; he was not.

Q. Was William Y. Beale an employee of the United States on December fifth, 1877, he appearing on the dividend receipt book of the Canal Company as receipting for what purports to be a draft payable to the United States?

A. He was not on the pay rolls of the Assistant Treasurer.

MR. GRAY: There is no mention of a draft there at all. Just of a dividend being signed for.

Q. Was there any dividend signed for by any such person as, "William Y. Beale"?

A. There was not.

Q. In the employ of the Assistant Treasurer at Philadelphia?

A. No, sir.

Q. There was not?

A. There was not.

Q. At that time, or at any time in this interim you have named, between 1874 and 1877, inclusive, does the name "William Y. Beale" appear?

A. I have examined Mr. Eyster's accounts of 1874 to 1878, both his pay rolls and contingent expense accounts, and the name "W. Y. Beale", does not appear in any of them.

Q. What would appear on the contingent expense account?

A. Postage, charwoman and other things like that.

Q. If any payment had been made for service for going from the office of the Assistant Treasurer to the Canal Company, would it have appeared, or should it have appeared in that expense account?

MR. GRAY: I object. It presumes that this man was to receive pay for his services.

By THE COURT:

Q. There was no such person employed there in any capacity?

A. No, sir.

By MR. NIELDS:

Q. And no such person received any compensation for doing what I have stated?

A. No, sir.

By THE COURT:

Q. You have stated that he was not there in any capacity whatever; am I right?

A. Yes, sir.

NO CROSS-EXAMINATION.

IDA HOWGATE.

IDA HOWGATE, a witness having been previously sworn, and now recalled, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. You have defined to the Court and jury your employment?

A. Yes, sir; did so yesterday.

Q. And that you have been in the United States Treasury for some while?

A. Yes, sir.

Q. Miss Howgate, will you look at those two boxes there and state what they contain?

A. Certificates of deposit issued by the Assistant Treasurer at Philadelphia.

Q. Will you produce the certificates of deposit that still remain in the boxes, and also those that you handed me a while ago, or, rather, yesterday?

A. Yes, sir.

MR. NIELDS: I offer in evidence these certificates of deposit for the dividend received by the United States.

MR. C. BIDDLE: Subject to the general objection which I have entered.

(The certificates of deposit, produced by witness, are admitted in evidence, subject to objection, and marked respectively, "Government's Exhibit No. 70", "Government's Exhibit No. 71", "Government's Exhibit No. 72", "Government's Exhibit No. 73", and "Government's Exhibit No. 74".)

Q. If drafts are sent to Philadelphia, payable to the Treasurer of the United States, what other record than those certificates of deposit does he make of the receipts of the money represented by those drafts?

A. He renders a transcript of his account to the Secretary of the Treasury.

Q. Have you the transcripts for all the fourteen dividends?

A. Yes, sir.

Q. Paid to the United States by the Chesapeake and Delaware Canal Company?

A. Yes, sir.

Q. Have you got them in your possession there?

A. Yes, sir.

Q. What is the first transcript?

A. September, 1853.

Q. What is the entry there?

A. September fourteenth, 1853, amount received from Treasurer of the Chesapeake and Delaware Canal Company on account of dividend of stock of that Company owned by the United States, thirteen thousand five hundred dollars.

Q. Do entries substantially like that appear in each and all of the subsequent transcripts?

A. Yes, sir.

MR. NIELDS: I offer those transcripts in evidence.

MR. C. BIDDLE: I will admit that they are the transcripts. Is it necessary to cumber our record with all this material?

MR. NIELDS: I want those records identified for the benefit of the jury as evidence of a full and complete character.

MR. C. BIDDLE: I will admit they are in evidence and can be referred to by counsel in his address to the jury.

THE COURT: Cannot you agree on that?

MR. NIELDS: I agree to that.

Q. How are those transcripts authenticated, if at all?

A. Signed by the Assistant Treasurer.

Q. They are signed by the Assistant Treasurer?

A. Yes, sir.

Q. Each one is signed?

A. Each one is signed by the Assistant Treasurer, or by the Acting Assistant, or one of the Acting Assistants.

Q. The Acting Assistant being whom? Either one or the other of the Assistant Treasurers?

A. Yes, sir.

Q. Where are these transcripts kept? In what official custody?

A. In the Secretary's files.

Q. The Secretary of the Treasury?

A. In the custody of the Division of Public Monies in the Secretary's office.

Q. Did you search those files for transcripts showing the payment of dividends declared by the Chesapeake and Delaware Canal Company, in 1873, 1875 and 1876?

A. I did.

Q. Did you search those transcripts for such dividend paid on October thirtieth, 1874, if at all?

A. Yes, sir.

Q. And November nineteenth, 1875?

A. Yes, sir.

Q. And December fifth, 1877?

A. Yes, sir.

Q. Covering those dates?

A. Yes, sir.

Q. Were there any such transcripts? Did you find any such transcripts?

A. Yes, sir.

Q. Will you produce those transcripts covering those dates?

A. Yes, sir. October thirtieth, 1874; November nineteenth, 1875, and December fifth, 1877.

Q. What do those transcripts purport to show?

A. They show the monies received by the Assistant Treasurer and the item corresponds to the certificate of deposit issued by him for payment of money.

Q. Will you look at the transcript covering the date of October thirtieth, 1874, showing what you have stated, and state whether or no there is any entry there showing the receipt of a dividend to the United States from the Chesapeake and Delaware Canal Company?

A. There is not.

Q. Should it, by law, so appear?

A. It should, yes, sir.

Q. Will you turn now to your transcripts for December fifth, 1877, and state whether or no there appears on that transcript any entries showing the receipt by the United States, at Philadelphia, at the Sub-Treasury, of a dividend from the Chesapeake and Delaware Canal Company?

A. There is no such entry.

Q. Will you hand me those two transcripts?

A. Yes, sir.

MR. NIELDS: I offer those transcripts in evidence.

MR. C. BIDDLE: This is simply to show that entries are not in there. I do not think they are competent for that purpose.

THE COURT: The Court, practically, ruled them in, and the Court, to be consistent, must rule them in now.

(Exception noted for defendant.)

(Transcripts admitted in evidence, subject to the objection, and marked respectively, "Government's Exhibit No. 75" and "Government's Exhibit No. 76".)

Q. I will ask you whether or no you examined the proper place for the custody of certificates of deposit from the Assistant Treasurer at Philadelphia, for dividends, if paid, of 1873, 1875 and 1876. Did I ask you before whether or not you had done so?

A. You did not ask me, but I did examine them.

Q. You did examine them?

A. Yes, sir.

Q. Are there any certificates of deposit, in their appropriate custody of the Assistant Treasurer at Philadelphia, for the receipt of dividends—any certificates of dividends for the dates of October thirtieth, 1874, or December fifth, 1877?

A. I did not find any.

Q. Did you find any such?

A. I did not find any.

Q. Did you search thoroughly those boxes for any certificates covering dividends declared in 1873, 1875 and 1876?

A. I did.

Q. And as a result of that search did you find any such certificates?

A. I did not.

Q. What other record of receipts by the Assistant Treasurer at Philadelphia is there in the Treasury Department?

A. When a certificate of deposit is received in the Treasury Department a record of it is made in a book prepared for the purpose.

Q. A contemporaneous record?

A. Yes, sir.

Q. Have you those books?

A. Yes, sir.

Q. Covering what years?

A. January, 1870, to December, 1872; January, 1873, to September, 1874; October, 1874, to December, thirty-first, 1877.

Q. Is there any record in any of these books, that you have designated, of the receipt of dividends of the Chesapeake and Delaware Canal Company, declared in June, 1873, 1875 and 1876? Did you find any such records?

A. I did not.

Q. You did not?

A. No, sir.

Q. Miss Howgate, had there been received by the Assistant Secretary, or the Secretary of the Treasury, a check from Henry V. Leslie, on or about November nineteenth, or eighteenth, 1875, where would that check appear of record, or where should it appear of record?

By MR. C. BIDDLE:

Q. Were you with the United States at that time, 1874?

A. I was not.

Q. When did you go there?

A. 1888.

MR. C. BIDDLE: I object to this witness testifying to anything as to the custom of the Department in 1874.

By THE COURT:

Q. Have you, or not, sufficient knowledge of the records of that Department to enable you to say where, in 1874, such an entry should be made?

A. I think so, yes, sir.

Q. Did you derive that knowledge from an examination of the books, or familiarity with the books covering that period?

A. Yes, sir; and I am doing the same work now.

Q. You are doing the same work now?

A. Yes, sir.

Q. That is, looking back?

A. Yes, sir.

By MR. BIDDLE:

Q. You are now speaking solely of having looked back over those years, and have no personal knowledge as to what they did during those years?

A. We are doing the same way now.

Q. Barring that you have no knowledge about what they did, no personal knowledge as to what they did in those years, about which you are testifying?

A. No, sir; except from the examinations.

Q. Except by an examination of the books?

A. Yes, sir.

Q. You were not employed there until 1888?

A. No, sir.

Q. By the Government?

A. Yes, sir.

MR. C. BIDDLE: I again press my objection.

THE COURT: I think you have a perfect right, Mr. Nields, to show, from her knowledge of the books, that she has sufficient knowledge that there is a uniform system—if it be a fact—a uniform system pursued, without any deviation, so far as she knows from her understanding and familiarity with the books. Then I think your question is a proper one.

(Exception noted for defendant.)

I understand you desire to enter an objection to any question the counsel for the Government may put on that line, although he has not put that question as yet?

MR. C. BIDDLE: Yes, sir.

By MR. NIELDS:

Q. You are in what Division of the Treasury?

A. The Division of Public Monies of the Secretary's office.

Q. Are records kept there of the receipts of the United States?

A. Yes, sir.

Q. Are records there kept of checks that are mailed to the Secretary of the Treasury?

A. Yes, sir.

Q. If a check were received at the office of the Secretary of the Treasury, what record should be made of its receipt?

A. The check would be sent to the Treasurer of the United States for collection, the Division of Public Monies would get the certificate issued for that deposit, and that certificate would become a record on one of these books.

Q. Has that been the uniform practice prevailing in the Treasury Department covering the years 1873 to date?

A. Yes, sir.

MR. C. BIDDLE: I again object.

THE COURT: You mean to the question immediately preceding?

MR. C. BIDDLE: Yes, sir; and to all questions on this line.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

Q. Is there a record of the receipt by the Secretary of the Treasury of a check in November, 1875, from the Chesapeake and Delaware Canal Company, or its Treasurer?

A. No, sir.

Q. There is none?

A. No, sir.

Q. Have you searched for such a thing?

A. Yes, sir.

Q. Did you or not, find it?

A. I did not find it.

Q. Is there any paper prepared by the Treasurer, or the Assistant Treasurer, which should contain an entry of such a check?

MR. BIDDLE: I object.

(Question withdrawn.)

Q. You have testified that transcripts were made by the Assistant Treasurer at Philadelphia?

A. Yes, sir.

Q. Were any similar transcripts made in the Treasury Department?

A. Made by the Treasurer of the United States.

Q. You have said that such a check would be transmitted to him?

A. Would be transmitted to him for collection.

Q. Should, or not, such a check appear in his transcripts of that case?

A. It should.

Q. Have you searched for a transcript of the Treasury of the United States in the month of November, 1875?

A. Yes.

Q. Have you gone through those transcripts?

A. I think those transcripts are not here. I looked through the whole month of November, 1875.

Q. The whole month of November?

A. Yes, sir.

Q. Was there any record of the receipt of such a check?

A. No record of the receipt, no, sir.

CROSS-EXAMINATION.

By MR. C. BIDDLE:

XQ. How many different departments has the Government had during the time that you have been employed by the Government wherein money is received and receipted for?

A. I do not know that I quite get the question.

XQ. How many different departments has the Government at which money is received?

A. Do you mean Sub-Treasury offices and United States depositaries?

XQ. Any department in the United States Government.

A. The Treasury of the United States, the nine Sub-Treasury offices, and a certain number of National Bank depositaries.

XQ. What other departments has the United States where they receive any money that may be due them?

A. I suppose all departments may receive money, but they are credited only in those particular offices.

XQ. But they all may receive it and then it is passed from them to the Treasury Department?

A. Yes, sir.

XQ. Then what monies these other departments would receive would appear in their accounts with the Treasurer?

A. They would become a record in the Treasury Department, yes, sir.

XQ. Have you examined the various accounts of the different departments of the Treasury during those years?

A. No, sir.

XQ. You have not?

A. No, sir.

XQ. Therefore, you cannot say what has been received through those various different departments?

A. I could know what had been received in the form of certificates of deposit, which would be the evidence of the deposit.

XQ. Not otherwise?

A. No, sir.

XQ. Unless it came in the form of a certificate of deposit?

A. Yes, sir.

XQ. You didn't look for and didn't find any record?

A. We might miss the certificate of deposit, but we still would have a record from the transcript itself, because we check the certificate against the transcript.

XQ. And so it must originally have come through a certificate of deposit, or otherwise you wouldn't find it?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. NIELDS:

RQ. All monies that are received by any department ultimately go to the Treasurer of the United States?

A. Yes, sir.

RQ. Every penny of public money goes to the Treasurer of the United States?

A. Yes, sir.

MR. C. BIDDLE: I object to this examination. How could she tell that? She has no knowledge of any other department.

THE COURT: The witness has answered your question.

RQ. Do I understand that all public monies received by every department of the Government are received by the Treasurer of the United States finally?

MR. C. BIDDLE: Answer that only of your own knowledge.

A. I know they must be.

RQ. You know they must be?

A. Yes, sir.

RQ. And the transcripts of the Treasurer of the United States are the transcripts you have examined in reference to this check? You have investigated in respect of the Treasurer's accounts for this check, have you?

A. Yes, sir.

RQ. What did those accounts show with reference to any check?

MR. C. BIDDLE: I object as not being properly in re-direct examination. I did not touch on this in my cross-examination, at all.

THE COURT: I think you have a right to do it, Mr. Nields.

RQ. I understand all public monies come to the Treasurer?

A. Yes, sir.

RQ. Into the Treasury of the United States Government?

A. Yes, sir.

RQ. And he accounts for them all?

A. Yes, sir.

RQ. Do, or not, his accounts show the receipt of any such check as I have asked you about from this Canal Company, the Chesapeake and Delaware Canal Company?

A. They do not.

RQ. They do not?

A. No, sir.

(At 1.05 o'clock P. M. a recess was taken until 2.00 o'clock P. M. same day.)

2.00 o'clock P. M. Same day.

MARY H. BRADY.

MARY H. BRADY, a witness having been previously sworn, and now recalled, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Miss Brady, I will ask you to take those papers here, that I now hand you, and tell me what they are.

A. These are covering warrants, covering money into the Treasury.

Q. Are they used with reference to the receipts of money by the United States, and were they used with reference to the receipts of the fourteen dividends?

A. Yes, sir.

Q. Covering money into the Treasury of the United States?

A. Yes, sir.

Q. Just explain to the Court and jury a little more in detail the character of those papers.

A. A covering warrant is issued by the Secretary of the Treasury and signed by him and countersigned by the Comptroller of the Treasury, and covers into the Treasury Department all monies belonging to the United States.

Q. What dividends do those covering warrants cover?

A. Do I have to read each one?

Q. Between what dates do they cover?

A. 1853 and June, 1873.

Q. What date in June?

A. June thirtieth, 1873. September thirtieth, 1853, to June thirtieth, 1873.

Q. What dividend does that covering warrant cover?

A. Do you mean the amount?

Q. No; what is that covering warrant; for what dividend?

A. I suppose it is the dividend due——

MR. GRAY: I object.

A. (Continued.) It does not give the number of the dividend.

THE COURT: These are in evidence, are they?

MR. NIELDS: No, sir. I propose to put them in evidence.

A. (Continued.) Dividend on stock by said company held by the United States. I suppose that it is the fifteenth dividend.

Q. Did you search the records for the dividends which were declared in June, 1873, June, 1875, and June, 1876?

A. I did.

(The further examination of this witness is suspended for the present.)

MICHAEL J. O'REILLY.

MICHAEL J. O'REILLY, a witness having been previously sworn and now recalled, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. What are these papers I now hand you?

A. The first is a warrant No. 170, third quarter of 1853, miscellaneous. That is the series of the warrant. The date of the warrant itself, as signed by the Secretary and Comptroller, is the thirtieth day of September, 1853. Below is this notation explanatory of it:

MR. C. BIDDLE: I think these papers ought to speak for themselves.

THE COURT: That was the suggestion of the Court a few moments ago, when you had not raised an objection.

MR. C. BIDDLE: I do raise an objection now.

THE COURT: Have these papers been submitted to the counsel on the other side?

MR. NIELDS: I think not. I should be very glad to do that.

MR. C. BIDDLE: I do not want to suggest anything in regard to that. I do not know that I want to see them.

A. (Continued.) I want to make my answer show that these bear a serial number in particular quarters, and that there is a line in them that shows the date of the deposit which the warrant itself, covers into the Treasury.

By MR. C. BIDDLE:

Q. What period do those papers cover?

A. They cover the period of deposits made from the fourteenth day of September, 1853, to the ninth day of May, 1873.

By MR. NIELDS:

Q. Are those certificates of deposit covered by those warrants between those dates?

A. Yes, sir; they are.

Q. What is that first one?

A. The first one is a deposit of September fourteenth, 1853.

Q. And the last deposit is what?

A. May ninth, 1873.

MR. NIELDS: I offer these in evidence.

MR. C. BIDDLE: I object, as being irrelevant, improper and not evidence in this case.

MR. NIELDS: These are covering warrants that relate to the first fourteen dividends, showing that the records of the United States are full and complete, with reference to the receipt of each of those dividends, but for the dividends of 1873, 1875 and 1876 there is no covering warrant. I

propose to follow up the covering of those deposits. The last covering warrant shows that it covers, as shown here on its face, a deposit with the Assistant Treasurer of the United States, at Philadelphia, on May ninth, 1873, which was the date of the certificate of deposit, for the fourteenth dividend.

THE COURT: That immediately precedes the first of the question, though.

MR. NIELDS: It does, yes, sir.

THE COURT: I think, for that purpose, it is admissible, and, consequently, will be admitted for that purpose.

(Exception noted for defendant.)

(The whole lot of papers last above referred to are admitted in evidence, subject to the objection, and marked, "Government's Exhibit No. 77".)

MARY H. BRADY.

MARY H. BRADY, a witness on behalf of the United States, again taking the stand, her direct examination is resumed as follows:

By MR. NIELDS:

Q. This covering warrant, which is the last one here, No. 1345, covers a deposit of what date?

MR. GRAY: I object, as it is unnecessarily prolonging the matter. The warrant speaks for itself, which the witness has already testified about. The warrant itself is already in evidence.

THE COURT: Those are in evidence, are they not?

MR. NIELDS: Yes, sir.

THE COURT: Then the objection is sustained.

Q. Did you search for covering warrants for subsequent deposits of any sums of money on account of dividends to the United States?

A. I did.

Q. Since May ninth, 1873?

A. Yes, sir.

By MR. BIDDLE:

Q. Up to what date?

A. 1877.

By MR. NIELDS:

Q. Did that include 1877?

A. Yes, sir.

Q. Then from May ninth, 1873, to and including the year 1877, did you make a search in the appropriate places for covering warrants for deposits?

A. I did.

Q. On account of dividends to the United States from the Chesapeake and Delaware Canal Company?

A. Yes, sir.

Q. Did you find any such covering warrants?

A. I did not.

Q. What other register, or record, is there kept of the receipts of the United States?

A. The Treasurer's quarterly account, which appears in these warrant books.

Q. Have you got them here?

A. Yes, sir.

Q. Will you just point out to the Court and jury what they are?

A. Any special dates?

Q. Just tell the Court and jury exactly what they are and how they are authenticated.

A. By the Treasurer of the United States.

Q. Have you gone through those records, Miss Brady?

A. I have.

By MR. C. BIDDLE:

Q. They are Treasury records?

A. They are the Treasurer's quarterly account of amounts of monies that came into the departments, for all monies paid out as well as all monies covered into the Treasury.

Q. What is the date just above?

A. From 1853 up to and including 1877. Of course, we did not find any warrant in those.

By MR. NIELDS:

Q. Are all monies paid into the United States Treasury covered by covering warrants?

A. Yes.

Q. Do you find in those records, authenticated by the Treasurer of the United States, any record of the receipt of any sum of money after May ninth, 1873, on account of dividend due the United States?

MR. C. BIDDLE: I object to these on the line just exactly in accord with what I have already done—being improper, irrelevant and not testimony in this case.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

A. Yes, sir.

Q. And which of those volumes you have characterized, as showing receipts by the Treasurer, are authenticated by the Treasurer?

A. There is the Treasurer's authentication.

Q. Each of these books is authenticated by the Treasurer of the United States?

A. Yes, sir.

Q. Is that the signature of the Treasurer of the United States?

A. Yes, sir.

NO CROSS-EXAMINATION.

HENRY C. PEARSON.

HENRY C. PEARSON, a witness produced, sworn and examined, on behalf of the United States, testifies as follows:

By MR. NIELDS:

Q. Are you employed by the Treasurer of the United States?

A. I am.

Q. How long have you been employed in the Treasury, Mr. Pearson?

A. Fifty years.

Q. For fifty years?

A. Yes, sir.

Q. You run back to what year?

Q. 1865, June.

Q. You are familiar with the records of the Treasury Department?

A. I am.

Q. Showing the receipts of money by the United States?

A. Yes, sir.

Q. Have you here the records from the beginning of the Government down to this year, showing receipts by the United States of all monies?

A. I have.

Q. Have you or not, records showing the receipt of every penny by the United States down to this year?

MR. C. BIDDLE: I object, as leading.

THE COURT: The objection is sustained.

Q. How comprehensive are your records, Mr. Pearson?

A. I have four series of records here.

Q. Describe each one of those series and tell us exactly what each cover.

A. I have, first, the Register of the Warrants, giving the depositor, the date of deposit, and the amount of the warrant.

MR. C. BIDDLE: Give the dates.

A. (Continued.) I have the first series, the Register of Covering Warrants from 1853 to 1878, inclusive.

Q. Go to the desk, or table, and point out where they are, and what they are.

A. They commence here and run down to here and go up there.

(Pointing to books in certain locations on the table.)

Q. I will ask you whether, or no, you have taken those from the custody of the United States? Are you custodian?

A. I am, under the Chief of Bookkeeping and Warrants of the Secretary's office in Washington, and I have been since 1868.

By MR. BIDDLE:

Q. From 1753, did you say?

A. No, sir; 1853. 1791 was the first volume, the establishment of the Government.

By MR. NIELDS:

Q. You say you have many series of books?

A. Four.

Q. And the first is what?

A. The Warrant Books; the record of warrants, that is, covering warrants into the Treasury.

Q. Showing all monies received and covered by covering warrants?

A. Yes, sir.

Q. And between what dates does that series cover?

A. This one that I have here, it begins——

Q. This here?

A. From 1853 up to 1878, inclusive.

Q. What is your second series of books?

A. A Compiled Statement of Receipts and Expenditures of the Government. They run annually—published annually—from 1853. I have those to 1890, up

to the time it was abandoned, but that form of statement and publication have been placed in the next series, which is continued from 1872, which takes in the 1890 entries of the Bookkeeping and Warrant Division—a Bookkeeping and Warrant Register. It was transferred to the Division of Bookkeeping and Warrants in the Secretary's office.

Q. What is your third series?

A. The third series is the Combined Statement of Receipts and Expenditures of the Government, from 1872. I have those up to 1914.

Q. 1914?

A. Yes, sir; compiled in the Division of Bookkeeping and Warrants of the Secretary's office.

Q. What is the fourth series?

A. The fourth series consists of one large book that contains all of the receipts of the Government and the different sources of miscellaneous receipts all the way from 1791.

Q. To the last compiled fiscal year?

A. To the last compiled fiscal year, yes, sir, which was 1906.

Q. Mr. Pearson, have you examined these records?

A. I have, carefully.

Q. Is there any record of the payment to the United States of any sum of money by the Chesapeake and Delaware Canal Company, on account of dividends declared in 1873, 1875 and 1876?

MR. C. BIDDLE: I object because he has not sufficiently defined where this gentleman gets this information, what these books are, and who they are kept by. Simply because he is the custodian, that does not give him the right.

THE COURT: You ought to go further.

MR. NIELDS: The witness himself says he is the custodian of these books, and he has given the character and names of the books.

Q. Where were these books obtained?

A. They were compiled from statements made in the Register's office, a portion of them, and there I compiled them from 1868 myself. I prepared the statements from which these were published, and in the Bookkeeping and Warrants Division, since 1890.

Q. As an official of the United States?

A. Yes, sir; as an official of the United States.

Q. And are those public documents of the United States?

A. They are.

MR. C. BIDDLE: I ask that Mr. Nields take these books up—whatever he wants to prove by them—takes them up in different batches, if he wants to, and let me have a clear understanding what this witness has to say about them, whether the books have been compiled by him, or whether he is the mere custodian.

THE COURT: I have been waiting to hear a question that has not been put to the witness as yet. You have not shown that he has examined those books.

A. (Continued.) I answered that question before, that I had examined them carefully.

By THE COURT:

Q. Up to what date?

A. Up to the date to which I bring them up here.

Q. How far does that extend?

By MR. NIELDS:

Q. How far does your examination, in reference to the present date, go?

A. For the fourth series, I have brought them all up to 1878; so far as the Registers are concerned I have brought them up to 1914; so far as the Receipts and Disbursements in this book are concerned, I have brought them up to 1906—that large book, which is the

Consolidated Receipts of all Receipts in the Treasury, and under the different heads, no matter what it is.

Q. Those records are up to and include the year 1914?

A. The statements, containing the receipts and expenditures, are brought up to 1914, in pamphlet form here. It has not been bound up like the others.

THE COURT: I want to know whether any one of these books—and they seem to be understood by the witness on the stand—whether those books would show any payments on account of dividends up to the time of bringing this suit.

MR. NIELDS: November eleventh.

THE COURT: Yes; that is what I want to know.

MR. NIELDS: Of the first of January, 1912, to be exact.

THE COURT: I want to know how far he brings it up.

MR. C. BIDDLE: I object to the witness testifying to what these books show until the books have been properly authenticated, and I object to this witness merely going and examining those books, over which he has no control, and attempting to come here and tell us what is in them. I object to this witness testifying to the contents of those books.

MR. NIELDS: The witness has testified that he has been in the Treasury since 1865, that he is the custodian of those books which he brings here, and that those books are Government records.

THE COURT: I know they may be Government records, but the question that is open in this case, is one of payment. If you bear that in mind, I think that the matters which are admissible ought to be pretty obvious.

Q. Up to what time do your books cover the receipts of the United States?

MR. C. BIDDLE: I object to this witness testifying to any books until we know by whom those books were kept and where they were kept, and what this witness has had to do with them. Merely because he happens to be the custodian of certain books does not give him the right to come in here and testify as to the validity of those books and what is or is not in them.

By THE COURT:

Q. Do you know, of your knowledge, what those books are, and whether they are official books of the United States?

A. I do.

Q. Kept pursuant to law?

A. Yes, sir; and kept by myself, and written. Since 1868 I haven't lost a day in the Treasury Department.

MR. C. BIDDLE: I want him to produce the books and specify therein where they were written by him.

By MR. C. BIDDLE:

Q. Will you answer that question?

A. I couldn't, in 1868 have written in that book. I wrote in a book in the Register's office, a similar book to that, and up to the time I was transferred to the Division of Bookkeeping and Warrants in 1895, I couldn't have done it in that book; but I did it in a similar book. I will qualify my testimony so far as that is concerned.

By MR. NIELDS:

Q. What is this book?

A. That is a Register of Receipt, covering miscellaneous warrants.

Q. Where was this book obtained?

A. It was obtained in the files of the Division of Bookkeeping and Warrants.

Q. In the Treasury Department of the United States?

A. Yes, sir.

Q. What are the dates?

A. This is from June thirtieth, 1848, to September twenty-sixth, 1854. Of course, we are dealing with 1853, now.

Q. You say this was obtained in the Division of Bookkeeping and Warrants?

A. Yes, sir.

Q. In the Treasury Department of the United States?

A. In the Treasury Department of the United States.

Q. Does it, or not, record the business of the United States?

A. It does.

Q. What business?

A. The miscellaneous receipt business.

Q. The miscellaneous receipt business of the United States?

A. Yes, sir.

Q. Would dividends on stock by the United States be listed as a miscellaneous receipt of the United States?

A. It would; if received.

Q. If received between the year 1848 and 1854, would it appear here?

MR. C. BIDDLE: I object to this witness testifying to the contents of that book, in any way. It was not kept by him, and he had nothing whatever to do with it; therefore, he is not competent to testify as to what that book contains, or does not contain.

THE COURT: The Court is only prepared to rule to this extent at the present time: If this witness swears that that book is an official book of the

United States, kept by the public authorities pursuant to law, then he can state, if he is able, that he has examined that book, and that he finds, or does not find, certain things. The Court will allow that to be done.

(Exception noted for defendant.)

MR. C. BIDDLE: I object to this witness testifying to these books. Simply because he says he gets them out of some department of the Government does not give him that right.

THE COURT: That is not the point at all.

MR. C. BIDDLE: And also because he says he does not know the contents of them.

THE COURT: The point suggested by the Court, is, that if this witness identifies that book as a book kept by public authority, pursuant to law, and as an official book of the United States, then he may say, if he can, that he has examined the book for the purpose of finding certain things, and that he has either found them, or not found them. There is no question the Court is ruling on now, but the Court makes this general statement in order to anticipate possible objection.

MR. C. BIDDLE: Then I ask that your Honor will give me an exception to your ruling.

THE COURT: I have not ruled on any question at all, and nothing has gone in, as yet. If a question is put, and you enter an objection, I understand it will be upon the same grounds as you have already stated.

MR. C. BIDDLE: Upon the grounds that this witness is not competent to speak as to the contents of that book.

THE COURT: I understand. You put your question. (Addressing Mr. Nields.)

MR. C. BIDDLE: My general objection is, of course, in there, as to why this is incompetent, but

I thought your Honor had stated that I should make that general objection in every case.

THE COURT: It is not necessary to repeat it, but the Court makes this statement in order that the counsel might understand what the attitude of the Court is in regard to that matter. That if the witness shows that they are books, officially kept, in a public department of the Government, by proper officials, then the Court will allow the witness, if he has examined those books, to say whether he has or has not found certain things, provided those things seem to the Court to have a material bearing upon the merits of this case.

MR. C. BIDDLE: The witness is shown a book running from June thirtieth, 1848, to September twenty-sixth, 1854, as I understand.

Q. State to the Court what this is.

A. That is a Register of Miscellaneous Covering Warrants from June thirtieth, 1848, to September twenty-sixth, 1854.

Q. Is it an official record or document of the United States?

A. It is.

Q. And where kept?

A. Kept in the files of the Bookkeeping and Warrant Division.

By THE COURT:

Q. Of the Treasury Department?

A. Of the Treasury Department, where all warrants are issued and received.

MR. NIELDS: I offer that book in evidence.

THE COURT: What is the purpose of the offer?

MR. NIELDS: My learned friend will not allow the witness to testify that he has made a personal examination of these books and the result of that examination, without, as I understand, the

records themselves being individually produced and made a part of this case.

THE COURT: What do you want to prove by that book?

MR. NIELDS: I want to show, if the Court please, that I have before the Court an official record of all the receipts of the United States down to and including November, 1911, the time when this suit was brought.

THE COURT: You mean down to and including 1914?

MR. NIELDS: It does extend to 1914, but it does also cover the period of the bringing of this suit and up to the year 1914, and that there is no entry there of the receipt by the United States of the dividends sued for in this case.

MR. C. BIDDLE: I object to the counsel making such a statement as that.

THE COURT: You will understand, gentlemen of the jury, that a statement of counsel made in that way, although in perfectly good faith, is not evidence in the case. Of course, you will be controlled by the evidence which comes from the witness.

I understood this witness to say that this book covered a period from 1848 to 1854. Well, you want to show that no money was paid at that time?

MR. NIELDS: I only want to comprehend, in a question, all the records that he had.

THE COURT: The point in this case is, whether or not that money was paid to the Government of the United States. How are you going to show that at a date twenty years before the dividends were declared?

MR. NIELDS: I don't know how to go about it without individually characterizing each one of these books.

THE COURT: How do you meet that point which has just been suggested by the Court? The Court is desirous of letting in everything that has a material bearing upon this case; but if this book covers the transactions only from 1848 to 1854, showing receipts for money, how has it any bearing upon the question as to whether the Government received money after 1873, or after 1875, or after 1876?

MR. NIELDS: I think that is entirely pertinent. I had the witness bring, from the files of the Government, records that antedated and succeeded these in order that we might have the entire record of the receipts of the United States, the record kept before the declaration of these dividends, and the record of their receipt.

Q. Will you kindly segregate the books you have, showing records covering receipts, including the year 1873 and thereafter, and including the year, up to and including the year 1914?

A. Here is one set and there is another.

MR. C. BIDDLE: I object.

THE COURT: You will have an opportunity to cross-examine to your heart's content.

(Witness segregates books as requested.)

MR. NIELDS: I withdraw the book and question for the present.

Q. Will you take up those books, one by one, and state to the Court and jury, exactly what each one is?

A. Each one of these?

Q. Yes; and what period it covers.

A. A volume of receipts and expenditures, of the United States, for the year 1873.

Q. I want you to come on right down from 1873 to 1914.

A. Another volume of receipts and expenditures, of the same, for 1874, and for 1875 and 1876 and 1877.

Q. By whom were those volumes printed?

A. They were printed by the United States Government, by the Treasury Department, and authenticated by the Secretary of the Treasury.

Q. Each volume?

A. Yes, sir; and the Register of the Treasury, also.

Q. Down to what date do those records come?

A. 1890.

Q. Will you take up the records from 1890 to 1914 and produce them?

MR. C. BIDDLE: I object to this witness referring to other books than those before him.

By THE COURT:

Q. You are referring to those four books before you?

A. Yes, sir; I am referring to those four books.

By MR. NIELDS:

Q. Will you turn, now, to the record in that series in the year 1873, the series denominated "Receipts and Expenditures of the United States"?

A. Yes, sir. This is the receipts and expenditures of the United States. It is really, all receipts and expenditures.

Q. What is that book you have in your possession?

A. "Receipts and Expenditures of the United States."

Q. Where does that book belong?

A. It belongs in the Division of Bookkeeping and Warrants.

Q. In the Treasury Department of the United States?

A. Yes, sir.

Q. Is it one of the official documents and records of the United States?

MR. C. BIDDLE: I object.

THE COURT: The objection is sustained.

Q. What kind of a document is that? What kind of a book?

A. It is a book in which is compiled all the receipts by the different headings and the expenditures under the different appropriations.

Q. Is that book kept pursuant to the official duties of the officers of the United States?

MR. C. BIDDLE: I object, because this witness has not shown himself to be competent to give such testimony.

THE COURT: The objection is sustained.

Q. You say you are the custodian of books there?

A. I am.

Q. Are you the custodian of that book?

A. Yes, sir.

Q. And custodian for whom?

A. For the Secretary of the Treasury, for my Chief of Division, who is under the Secretary of the Treasury.

Q. Where does the custody of records of United States of that kind belong?

A. They belong where we can conveniently get them to answer information requested from the general public. They want to know all about these past transactions.

Q. Does or does not that book contain the records of the receipts of the United States?

MR. C. BIDDLE: I object.

THE COURT: The objection is sustained.

Q. What does that book contain?

A. It contains the receipts under the different headings; not only the miscellaneous receipts under the different headings, but also the receipts from Internal Revenue, Sales of Public Lands and Public Debt.

MR. C. BIDDLE: I ask that the witness' answer be stricken out, because he has not shown himself to be competent to testify to the contents of that volume.

By THE COURT:

Q. Do you know the contents of that volume?

A. Yes, sir; I do. I saw it compiled.

Q. By what authority, do you know, was that book made?

A. By authority of the Chairman of the Committee on Appropriations of Congress. This is the letter of the Secretary of the Treasury to the Chairman of the Committee on Appropriations of the House:

"Treasury Department, Washington, D. C.

January 4th, 1873.

Sir:

In compliance with your verbal request I have the honor to transmit herewith a statement of the receipts and expenditures of the Government by appropriation for the fiscal year ending June thirtieth, 1872.

I am,

Very Respectfully,

George S. Boutwell,
Secretary.

Hon. J. A. G.

Chairman of the Committee on Appropriations, both of the Senate and House Committee."

By MR. NIELDS:

Q. How was that printed, did you say?

MR. C. BIDDLE: I object. This witness has not shown himself competent to testify to that book, unless he actually did the printing himself.

THE COURT: For what purpose do you propose to examine this witness with respect to that book?

MR. NIELDS: I propose to show that the money sued for was never received, and as evi-

dence of that, the records of the United States, which are public records, do not show the receipt of that money.

By THE COURT:

Q. Have you, or not, knowledge as to whether the book just referred to is a public record of the United States?

A. I have a knowledge, Judge, because I was in the office of the Register of the Treasury and assisted the clerk who compiled this book by comparing with him as to the aggregate and the individual amount of receipts.

Q. You say you assisted the clerk in compiling a book. I want to know whether you assisted the clerk in compiling this book?

A. Yes, sir; I did, in that way.

MR. C. BIDDLE: I object. The witness has produced a printed copy of a book which is called "Combined Statement of the Receipts and Disbursements, Apparent and Actual, of the United States, for the fiscal year ending June thirtieth, 1872," and on the outside of the book the dates are "1872 to 1880." He has testified that he assisted a clerk in combining these records, which consisted of records for the different years. I see here from 1872 to 1880, in different batches, and bound together, but different years. This book is being offered and the testimony of this witness is being produced for the purpose, not of proving entries in this book, but for the purpose of proving that entries are not in this book. This book cannot be offered in evidence for that purpose. First of all, this witness is not competent to testify, merely because he assisted some clerk in bringing this printed statement together. That does not make him competent to testify to these various

entries when they were made or how they were made. He has had no part whatever in making the entries there printed in this book. He has brought them together, and assisted a clerk in combining. He is, therefore, incompetent to testify as to the contents of that book, and the book is offered for an improper purpose, namely: To prove not records that are in the book, but records that are not in the book.

THE COURT: Precisely; and the Court thinks it is admissible for that purpose. You offer it for the purpose of showing what?

MR. NIELDS: The non-receipt of money sued for in this case.

THE COURT: That entries, which should properly have been made in that book, if the dividends had been paid, were not entered in that book?

MR. NIELDS: Exactly.

THE COURT: The Court rules that that is a proper offer of testimony.

MR. C. BIDDLE: My grounds of objection are the incompetency of the witness and the improper purpose for which the book is offered, therefore, they are irrelevant and improper and should not be admitted.

(Exception noted for defendant.)

By MR. NIELDS:

Q. This book shows what?

A. The receipts and expenditures of the United States for the fiscal years from 1873 to 1880.

Q. Is there an entry in that book showing the receipt by the United States of any sum of money on account of dividends declared in the years 1873, 1875 and 1876?

MR. C. BIDDLE: I object to the question.

THE COURT: The form of the question may be

objectionable. You have shown that this is a book kept in the Treasury Department?

MR. NIELDS: I have; yes, sir.

THE COURT: And it relates to public transactions and public moneys? I think you have a perfect right to show, by this witness, that he has examined that book with especial reference to certain points, and that he has or has not found anything in relation thereto.

Q. Have you made an examination of that book with reference to any entry as to a receipt, by the United States, of any dividend from the Chesapeake and Delaware Canal Company?

A. I have.

Q. As a result of that investigation will you state to this Court and jury whether or no there is any entry in that official document showing the receipt by the United States of any payment on account of dividends of the Chesapeake and Delaware Canal Company paid to the United States?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.
(Exception noted for defendant.)

A. In this book?

Q. Yes.

A. I have.

Q. You have made such an investigation?

A. I have.

Q. Do you find any entry there as to the receipt by the United States of such a sum?

MR. C. BIDDLE: I object.

(Question withdrawn.)

Q. Is there any entry in that book shown to you by your investigation of the receipt by the United States of any sum of money on account of dividends of the Chesapeake and Delaware Canal Company, for June, 1873, and thereafter?

MR. C. BIDDLE: I object, and my grounds are, incompetency of the witness and impropriety of the testimony; also being leading as well.

THE COURT: If you object upon the ground that it is leading, the Court will have to sustain you, because it is leading.

(Objection sustained.)

Q. Is there, or not, any record of the receipt of any sum of money on account of dividends from the Chesapeake and Delaware Canal Company in that book?

MR. C. BIDDLE: I object, as being leading.

THE COURT: The objection is sustained.

Q. What entries, if any, are there in that book with reference to the receipt of monies from the defendant in this case?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

A. Shall I read it?

Q. Yes.

A. During the fiscal year 1873, here is an entry from dividends on stock of the Delaware and Chesapeake Canal, forty-three thousand eight hundred and seventy-five dollars, the aggregate of two dividends.

Q. The aggregate of two what dividends?

MR. C. BIDDLE: I object, because the witness has not shown in any way, that he knows, or can testify as to what it is an aggregate of.

THE COURT: The objection is overruled, upon the ground that the counsel has full opportunity, on cross-examination, to elicit the fact, if it be a fact, that the witness does not know anything about it, if he can show it.

(Exception noted for defendant.)

Q. What is the entry there?

A. From dividends on stock of Delaware and Chesapeake Canal Company, held by the United States, forty-three thousand eight hundred and seventy-five.

Q. What sums of money are there referred to, if you know?

MR. GRAY: I object, and for this reason: This defendant is not interested in any dividend paid by the Delaware and Chesapeake Canal Company. The defendant here is the Chesapeake and Delaware Canal Company.

THE COURT: The witness has referred to the Delaware and Chesapeake Canal.

A. (Continued.) That is just a transposition.

Q. A transposition of the name?

A. A transposition of the two names.

Q. Have you any other accompanying entries showing just exactly what that entry signifies in your books?

A. Yes, sir.

MR. GRAY: I ask to have his answer stricken out, as it has no reference to the defendant company.

THE COURT: No, it is not stricken out, not yet. Suppose it should be proved, either by the statement of this witness or from his own knowledge, or from documentary evidence, that the company named the "Delaware and Chesapeake Canal Company", was, really, the "Chesapeake and Delaware Canal Company"? Wouldn't he have a right to show that?

MR. GRAY: As I understand the ruling of the Court, these documents are admitted as public documents of the United States, and they import verity on their face, and accuracy, because they are public documents. Now we find one that does not refer to this company. I do not care what he

refers to in other documents, as to dividends from this company, he cannot use that book, which is a public document, and enforce its verity to charge this company.

THE COURT: Suppose an entry should be made in the name of Joseph Jones, and the real transaction was with John Jones, and suppose by reference to a collateral book it could be shown that although the name Joseph Jones was used, in point of fact it was intended to be John Jones. No question in the world but what that could be done.

MR. GRAY: That could very well be, but here is a book he wants to introduce in evidence, and he doesn't pretend to testify as to his knowledge of these dividends. He was simply a compiler of the report. My objection now is that here is a book which I understand, your Honor, on the contention of the District Attorney, has been admitted on the ground that it is a public document and imports verity, and that it was compiled in accordance with law, and that it imports verity because United States officials have compiled it. Now, they have an entry in that book in the name of the Delaware and Chesapeake Canal Company. He may prove other facts by other books, but this book, I contend, from which he is testifying, is valueless for that purpose.

THE COURT: The Court's understanding is that the attention of the witness is being drawn to some collateral book, which has a bearing upon this very matter which is the ground work of your criticism or objection. Mr. Nields, am I right or wrong?

MR. NIELDS: You are right.

THE COURT: I think you have a perfect right to pursue that within limits. What is your objection?

MR. GRAY: My objection is this: That here Mr. Nields is having this witness not testify of his own knowledge, but to read out of this book, and is attempting to read into evidence here from this book a statement of a dividend paid by the Delaware and Chesapeake Canal.

THE COURT: Mr. Nields has not offered those books in evidence.

MR. GRAY: I move then that the answer of the witness be stricken out, an answer in which he read "Delaware and Chesapeake Canal Company", from that book.

THE COURT: The Court refuses to strike it out unless it appears, upon the Government's proof, that it was the Delaware and Chesapeake Canal Company. Then it goes out, and the Court will have it stricken out nunc pro tunc.

MR. C. BIDDLE: The witness has been testifying in regard to the contents of the book before him. If he wishes or desires to examine into any other book, he can remain on the stand and let us know what books he has examined. But he is now testifying as to the contents of these books.

Q. Have you the original records as well?

A. I have. Yes, sir.

Q. Have you found the original entries in the books of the Government from which that entry was taken?

A. I have.

Q. What is the book from which you are now testifying?

A. This is the Register of the Receipt Covering Warrants—original Receipt Covering Warrants.

Q. What are these papers, being marked "Government's Exhibit No. 77", which I now hand you?

A. These are receipts covering warrants, covering monies into the Treasury.

Q. Is there a record of the last two receipts of covering warrants contained in this exhibit which I hand you, being "Government's Exhibit No. 77"?

A. There is.

Q. Where is that record made?

A. Made in the office of the Secretary of the Treasury.

Q. Have you a book on which the entry appears?

A. I have.

MR. NIELDS: The last two covering warrants, and the accompanying entries, are as indicated here.

THE COURT: Are those books in evidence?

MR. C. BIDDLE: They are not in evidence. And I object to this witness testifying to the contents either of this book, or the prior book, because neither of the books have been offered in evidence in this case.

THE COURT: No; the book is not in evidence.

MR. NIELDS: It has not been offered in evidence. If the Court please, I desire to offer in evidence this Register of Covering Warrants, covering the fourth quarter of 1872, under date of December thirty-first, being covering warrant No. 864, and also the Register of Covering Warrants under the date of the second quarter of 1873, under the date of June thirtieth, being No. 1345.

THE COURT: Is there any objection to that?

MR. GRAY: Yes, sir. And I object especially to the covering warrant No. 864, because it referred to a warrant of the Delaware and Chesapeake Canal Company.

MR. C. BIDDLE: And I object to this offer because this book is not the original book, and has not been authenticated, in any way; and also as being improper for the other reasons which I have already given.

THE COURT: Have you proved the character of that book?

Q. Will you state to the Court and jury what that book is?

A. That is a Register——

MR. C. BIDDLE: I object to the witness stating what that book is until he has shown——

By THE COURT:

Q. Do you know what that book is, sir?

A. I do.

Q. Of your own personal knowledge?

A. I do.

Q. State what it is.

A. It is a Register of the Miscellaneous Receipt Covering Warrants.

MR. C. BIDDLE: Does he simply know from reading the title on it, or has he had anything to do with keeping it?

Q. Aside from reading the title?

A. I do, sir.

By MR. NIELDS:

Q. I will ask you whether or not, those two entries in that Register refer to the two covering warrants in "Government's Exhibit No. 77"?

MR. GRAY: I object. He has no right to ask that question. If he properly proves the book, he may offer the entries in evidence, and then it is for the jury to determine if they are properly offered, or material, as to whether or not they refer.

MR. NIELDS: There is a number to each one, and there is a number opposite each entry corresponding to the number of the warrant, and the amounts, and the dates are identically alike.

THE COURT: A corresponding number to the Chesapeake and Delaware Canal Company?

A. (Continued.) The second one there; and here is one not in the second.

By THE COURT:

Q. Where is No. 864?

A. That is this one, dividend, "Delaware and Chesapeake Canal Company". Then here it shows, "Dividends of the Chesapeake and Delaware Canal Company".

THE COURT: I do not think that that is admissible.

MR. NIELDS: We have here the transcripts with the names Delaware and Chesapeake and Chesapeake and Delaware, with exactly the same number of those two covering warrants, of the same date, under the same fund.

THE COURT: And in each case it is the name "Delaware and Chesapeake Canal Company"?

By MR. NIELDS:

Q. After June, 1873, have you a record of the receipts of the United States?

A. I have, up to the last compiled fiscal year.

Q. Have you up to the year 1914?

A. Yes, sir.

Q. Have you investigated those records yourself?

A. I have, yes, sir.

Q. What are these records, showing the receipts of the United States since June, 1873?

MR. C. BIDDLE: I do not think this witness has been shown to be competent to testify to those records, or what is in them.

THE COURT: Has the witness stated that these are public records?

MR. NIELDS: This witness, as I understand, has testified that these are public records of the United States.

A. Written by me. That was written by me in the Register's office.

THE COURT: You have a perfect right, Mr. Nields, to show by this witness, if he has made an examination, whether he has or has not been able to find certain things relating to this matter.

Q. Have you investigated personally these official documents?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

A. I have, fully and completely.

MR. NIELDS: I now offer in evidence all these official records of the United States of which and about which this witness has testified.

THE COURT: The Court made a suggestion this morning which was intended to serve the convenience of the counsel, but, apparently, it had failed to have that effect, and that was, that the Government should tender to the defendant the fullest opportunity to examine any of these books in order to obviate precisely the objection that was suggested to having them all thrown into the case, possibly, unnecessarily. From the remark which is made by Mr. Biddle I infer that that is not a satisfactory program, and therefore, I now understand that you offer all the books in evidence?

MR. NIELDS: I do, sir.

THE COURT: That is, those official books?

MR. NIELDS: Those official documents.

MR. C. BIDDLE: The suggestion of your Honor has not been carried out in any way, on the part of the District Attorney, either to let me see or examine any of the books which appear here on this table. I have only seen them just as your Honor has seen them. I think he has no right to

offer records here in this general way, books not identified, so that I cannot tell what they are. He offers a lot of books on a table that I know nothing about.

THE COURT: Will you please take up each book seriatim, and let this witness prove, if he can, whether that is an official document or book of the United States, kept by authority of law, and then showing the receipts of money, and after you have done that you can offer all of them.

Q. Start with the receipts after June, 1873, and give us the records containing those receipts. Is this one of the books?

A. Receipts and Expenditures of the United States, 1872 to 1880. The next one, please?

Q. Here it is. You identify this as an official document of the receipts and expenditures of the United States from 1881 to 1888?

A. Yes, sir.

MR. NIELDS: I ask that this book, covering the period from 1872 to 1880, be marked for identification.

(Book marked for identification, "Government's Exhibit A-1," as of this date.)

Also that the book covering the period from 1881 to 1888 be marked for identification.

(Book marked for identification, "Government's Exhibit A-2," as of this date.)

Also that the book covering the period from 1889 to 1895 be marked for identification.

(Book marked for identification, "Government's Exhibit A-3," as of this date.)

Also that the book covering the period from 1896 to 1900 be marked for identification.

(Book marked for identification, "Government's Exhibit A-4," as of this date.)

Also that the book covering the period from 1901 to 1906, be marked for identification.

(Book marked for identification, "Government's Exhibit A-5," as of this date.)

Also that the book covering the period from 1907 to 1911, be marked for identification.

(Book marked for identification, "Government's Exhibit A-6," as of this date.)

Q. Is there any more in this series up to 1914?

A. Yes, sir. 1912, 1913 and 1914—not bound yet.

MR. NIELDS: I ask to have marked for identification book, "Combined Statement of Receipts, Disbursements, Balances, etc., of the United States during the Fiscal Year Ended June thirtieth, 1912."

(Book marked for identification, "Government's Exhibit A-7," as of this date.)

Also ask to have marked for identification the book, "Combined Statement of Receipts, Disbursements, Balances, etc., of the United States during the Fiscal Year Ended June thirtieth, 1913."

(Book marked for identification, "Government's Exhibit A-8," as of this date.)

Also ask to have marked for identification book, "Combined Statement of the Receipts, Disbursements, Balances, etc., of the United States, during the Fiscal Year Ended June thirtieth, 1914."

(Book marked for identification, "Government's Exhibit A-9," as of this date.)

Q. Will you state to the Court and jury what those documents are?

A. Registers of Miscellaneous Receipts of the Government.

MR. NIELDS: I ask that this Register be marked for identification, being a Register of the Revenue Covering Warrants, Miscellaneous, Secretary of

the Treasury, Warrant Division, Third Quarter, 1872, and Second Quarter, 1872.

(Book, Register, marked for identification, "Government's Exhibit A-10," as of this date.)

I also asked to have this book marked for identification, being a Register of the Revenue Covering Warrants Miscellaneous, July first, 1873, to December thirty-first, 1874.

(Book, Register, marked for identification, "Government's Exhibit A-11," as of this date.)

I also ask to have marked for identification, book, being a Register of the Revenue Covering Warrants, Miscellaneous, Secretary of the Treasury, 1875 to 1876.

(Book, Register, marked for identification, "Government's Exhibit A-12," as of this date.)

I also ask to have marked for identification, book, Register of the Revenue Covering Warrants, Miscellaneous, Secretary of the Treasury, 1876 to 1878.

(Book, Register, marked for identification, "Government's Exhibit A-13," as of this date.)

I also ask to have marked for identification book, Receipts of the United States, 1791 to the last compiled fiscal year, 1906, Register's office, Treasury Department.

(Receipts, marked for identification, "Government's Exhibit A-14," as of this date.)

By MR. BIDDLE:

Q. Where do you find "1906" in that book?

A. This book is interminable. It runs on forever. (Witness having reference to Government's Exhibit A-14 for identification.)

Q. Show me the date where that book ends, the period it covers?

A. It never ends.

By THE COURT:

Q. What is the latest entry in the book?

A. That receipt heading which is 1913, would include 1906 or 1907, because it is being brought forward.

Q. Where does it end with respect to any entry that can be, at all material to this case?

MR. NIELDS: This book appears to be the receipts of the United States from 1791 to blank.

By MR. NIELDS:

Q. What is the character of the receipts here set forth?

A. All sources of Government miscellaneous receipts.

Q. Of miscellaneous receipts, all of them?

A. No, sir; of Customs, Lands, Internal Revenue, and Public Debt. All sources are right there up to the last posting. I am posting that now.

Q. Do I understand it includes Customs, Internal Revenue—

A. No, sir; excludes that.

Q. Just miscellaneous receipts?

A. Just miscellaneous receipts; yes, sir.

Q. Are dividends on stock held by the United States so classed?

A. Miscellaneous Revenue.

Q. Then would dividends on stock held by the United States appear here?

A. In the Delaware and Chesapeake Canal.

Q. Or any other corporation?

A. No, sir; unless they were paid into the Treasury, they could not be in there.

Q. But if paid into the Treasury, or received by the Treasurer of the United States, would they appear here?

A. They must be in that book. It is for the purpose of facilitating our answering questions. We have some very foolish questions asked us sometimes.

Some Departments will ask questions about receipts away back in the time of the Indians, and so forth, and to facilitate making statements, that is posted. It is supposed to be posted up to date, so as not to go over the full period, and the question necessarily, wants to be answered promptly. We do not want to take three or four days in answering a question, and as a consequence, that is kept up.

By MR. C. BIDDLE:

Q. Just explain the one word "posted." From where?

A. That is posted from this Receipt and Expenditure, that long pile of sheet books, posted from there. They are posted in there by years, so that at any time we can aggregate them up and tell in a minute all about them. The "Conscience Fund", we keep right up.

By MR. NIELDS:

Q. What is your official designation?

A. Bookkeeper, in the Division of Bookkeeping and Warrants, Secretary of the Treasury.

Q. That is your character, bookkeeper, is it?

A. Yes, sir; I am bookkeeper.

Q. You said something about custodian. Are you custodian of the books, as well?

A. I am, because I refer to them, and they are kept in files, and while I am not in the files room I am custodian in the case of keeping them seriatim—by the different Customs, Lands, Internal Revenue and Sales of Public Lands.

Q. I will ask you to examine these books which have been marked for identification Government's Exhibits A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10, A-11, A-12, A-13, and A-14, and state to the Court what those books are—they having been marked for identification in the way I have indicated here.

A. They are compilations of the receipts and expenditures of the Government taken from the Registers of Warrants.

Q. Where are those kept?

A. They are kept under my charge, right behind me, where I work at my desk.

Q. In the performance of any official duty?

A. Oh, yes; not current duties. Perhaps, ten or twenty years ago some one would want to know something about a receipt, and I would refer to that book; then I would have to go to that book, or the other book and get the data.

Q. In what office, or what Executive Department of the Government are those books?

A. Treasury Department.

Q. What transactions, if any, do they record in that Department of the Government?

A. What transactions?

Q. Yes.

A. The receipts and repayments, which our Division does.

Q. Of what?

A. Of money covered in to the Treasury.

Q. What is your Division?

A. Bookkeeping and Warrants.

Q. Of money covered into the Treasury?

A. Yes, sir.

Q. What money is that?

A. Money received from all sources.

Q. Belonging to whom?

A. Belonging to the Government.

Q. Are these transactions here recorded?

A. They are.

MR. C. BIDDLE: I object, unless this witness shows he is competent to testify.

Q. Have you examined these books in reference to receipts from this defendant?

A. I have.

Q. Are there, in the records of the Government, any entries showing the payment of any sums of money by the defendant after June, 1873?

MR. C. BIDDLE: I object.

THE COURT: You can show that he has examined those books and what he has been able to find and what he has not been able to find.

MR. C. BIDDLE: I desire to put on the record my objection, which is—

(Question withdrawn.)

Q. Have you made a critical examination of these books?

A. I have.

Q. Do you know from that critical examination what receipts, if any, are here recorded from the defendant?

MR. C. BIDDLE: I object. The witness has no right to testify to the contents of books which he did not keep himself, and which are, in no sense, public documents. These books, so far as they refer to this business with the Chesapeake and Delaware Canal Company, or as they show, in some instances, the Delaware and Chesapeake Canal Company, must be a registry only of the private affairs of this Government, and not in any sense public documents; therefore, they must be proved with the same certainty as the documents of any other individual when they come into this court. It is not a public record such as can be submitted to this Court, because it is printed. These books are books not the original records kept by any department that would receive the payment, if it was received, but they are compilations put together, compilations not of the actual times, but apparent times, simply a combination of books, and this one book is a register, as the wit-

ness has spoken of, a register which makes it easy for him to find entries, not requiring him, evidently, to go back and look at the compiled records. None of these books are the records of any department. They are compilations which have been brought together, and are not public documents, in any way.

This witness has not shown himself competent to testify to them, and the books have not been proved or offered in evidence. Therefore, I object to any questions relating to them.

THE COURT: I understand your objection is that he should not be permitted to testify as to those books until after they are in evidence.

MR. C. BIDDLE: Certainly. That is one of my objections.

MR. NIELDS: I now offer these books in evidence, being the books which have been marked for identification from A-1 to A-14, inclusive.

THE COURT: You offer them in evidence for the purpose of showing what?

MR. NIELDS: For the purpose of showing the non-receipt by the United States of any sum of money on account of dividends declared by this defendant in 1873, 1875 and 1876.

THE COURT: That is the sole purpose?

MR. NIELDS: And also the receipt of the fourteen dividends which the Government, in this case has shown, in fact, to have been received by the United States.

MR. C. BIDDLE: I object to that offer on the ground which I have already stated, that the books have not been proved; secondly, that they are offered not for the purpose of showing that certain entries are in there, but for the purpose of showing that no entries are in there. They have not produced any one who keeps the original rec-

ords. The original records have not, even, been produced. They are copies of them, compilations of them, and nothing from which we can verify the correctness of the examination which this witness may have made, in correctness of the statements that appear in those books—they are simply copies of something else.

THE COURT: I understand your point is that they are not public proof, although the moneys referred to therein go into the United States Treasury and are applied to public purposes?

MR. C. BIDDLE: Some of this money may be; but, as I say, they are, principally compilations of records of the different departments.

THE COURT: Do you think that is a test of the public character of a book, whether it is a compilation, or not?

MR. C. BIDDLE: No, sir; but when you come to offer this book in evidence, you have got to offer the original books in evidence.

THE COURT: Have you any authority to support that contention?

MR. C. BIDDLE: I have always thought that books of original entry must be offered.

THE COURT: I can only say that my impression is—and I am always ready to correct false impressions—my impression is very strongly in favor of the admissibility of these books; but I would suggest to counsel on both sides that they might sit up tonight, if necessary, and produce some authorities in the morning.

(At 4.20 o'clock P. M. adjournment was had until Friday, January seventh, 1916, eleven o'clock A. M.)

Wilmington, Delaware,
January 7, 1916,
11.00 o'clock A. M.

THE COURT: I think the Court adjourned on the question of evidence, Mr. Nields having stated, "I now offer these books in evidence, being the books which have been marked for identification from A-1 to A-14, inclusive," and then there was some discussion, and it wound up with the statement by the Court that counsel might examine the authorities and say what they had to say today. Mr. Biddle has the floor.

MR. C. BIDDLE: I wish to state that I object to the admission of these books because they are hearsay and incompetent, and not proper evidence to prove the offer made by the counsel. I do not want to take up the time of the Court and jury, by discussing the question further unless your Honor should desire it, and if your Honor has made up your mind—

THE COURT: If you have any patent authorities, I should be glad to hear them.

MR. C. BIDDLE: I have authorities which, of course, I could argue from, some English authorities, and some authorities in this country, which would seem to make those books inadmissible. If your Honor has made up your mind, I do not want to bore you.

THE COURT: My mind is not made up. I stated last night, or rather, yesterday afternoon, that I had a strong impression, but that I was always ready to correct an impression that proved to be a false one. So I am perfectly ready to recede from any impression that I may have entertained if you can show me that I am wrong.

MR. C. BIDDLE: I think the same thing can be accomplished if your Honor is satisfied, at the present minute, to accept them, and after cross-examination I would make a motion to strike out.

THE COURT: What have you to say, Mr. Nields?

MR. NIELDS: If the Court please, those various records are shown to be in the custody of the United States, in the Treasury Department of the United States, relating to the business of the Treasury Department of the United States, to wit, the receipt of public money.

There was a suggestion yesterday from the learned counsel as to their being private books of the United States. As to the receipts of moneys by the United States, I can conceive of nothing more public, nothing more essential, nothing more necessary to the existence and the conduct of the Government. These series of books which the witness has identified as showing all the receipts of the United States from 1873 to 1914, inclusive—these books covering the entire period about which we are most interested, to wit, the receipt of any moneys by the United States from dividends of the defendant declared after June, first, 1873—the whole of that period is covered by these books. The character of the books appears from the fact, first, that it is printed by the Public Printer; second, that the Chief of the Warrants Division of the Secretary of the Treasury, as it appears on the title page, states, "I have the honor to transmit herewith the combined statements of receipts and disbursements of the Government by appropriation, exclusive of the principal of the public debt for the fiscal year ended June thirtieth, 1872." So this ended June thirtieth, 1873, the fiscal year, I would state, of 1873, ending June thirtieth, began on July first, 1872; so that the receipts of the United States for dividends declared in 1872 would belong, necessarily, in the fiscal year of 1873, which is here set forth as an official document, the evidence in the case being that the dividends of 1872 were received in November, 1872, and May, 1873, each of twenty-one thousand dollars. Those amounts, which the Govern-

ment has shown were paid, appear in the report for the fiscal year ending June thirtieth, 1873. The Secretary of the Treasury thereupon transmits to the Chairman of the Committee on Appropriations of the House of Representatives, this report:

“In compliance with your request I have the honor to transmit herewith a statement of receipts and expenditures of the Government by appropriation for the fiscal year ended June thirtieth, 1872.”

This appears to be the receipts and disbursements of the United States for the fiscal year ended June thirtieth, 1872. It appears to have been an official docket, compiled by the Secretary of the Treasury, transmitted to the Chairman of the Appropriations Committee of the House of Representatives, and necessarily has to do with the expenditures of the Government based upon its receipts.

So that nothing could be more essentially fundamental in its character than these documents upon which the appropriations of the United States are based, as shown.

And taking any others from the same file.

So that we have here a series of official documents from 1872 to 1914, inclusive, covering the very period about which we are making inquiry, which are, in their character, official, and printed by the Government and essential to the conduct of the public business.

So with these other three books, “The Receipts of the United States and Register of Revenue Covering Warrants for the period of 1873.”

At this time I simply tender in evidence the receipts and disbursements of the United States beginning with the year from 1872 to 1880, inclusive, 1881 to 1888, inclusive, 1889 to 1895, inclusive, 1896 to 1900, inclusive, 1901 to 1906, inclusive, 1907 to 1911, inclusive, and the years 1912, 1913 and 1914, they having all been marked for identification.

THE COURT: Are they not all included in A-1 to A-14 inclusive?

MR. NIELDS: No, sir. Eight volumes comprehend this list.

THE COURT: Then your offer is this, and this is what is being discussed:

"I now offer these books in evidence, being the books which have been marked from A-1 to A-14, inclusive"?

MR. NIELDS: Yes, sir. In conformity with the suggestion of the Court I shall have to modify that tender, and confine the tender to this series of books about which I have been speaking. They are marked respectively, A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8 and A-9—being from A-1 to A-9, both inclusive.

MR. BIDDLE: As this is a new offer I want to renew my objection which I have stated to the larger offer.

THE COURT: The greater includes the less.

MR. NIELDS: There are very numerous authorities on the question of a book of this character.

THE COURT: Have you any on the precise point which was made, or, at least, one of the points upon which it would seem to the Court, Mr. Biddle relies, i. e., the fact that these books do not contain anything to show that the persons making the entries in them had knowledge of the transactions to which they relate? Am I right?

MR. C. BIDDLE: Yes, sir.

MR. NIELDS: That rule of evidence is the shop book rule and applies to tradesmen's books, and that form of authentication of tradesmen's books is not essential in order that the essential rule of hearsay evidence may apply.

(Mr. Nields here cites authorities and presents argument in support of his offer.)

THE COURT: You say you offer those books for the

purpose of showing that there was no entry of the receipt of the dividends in question?

MR. NIELDS: I do; yes, sir.

(Mr. Nields here cites further authorities and presents further argument in support of his offer.)

(Mr. Biddle cites authorities in support of his objection to the admission of the books in evidence.)

MR. NIELDS: The position of a public document and of shop books of tradesmen occupy, in the law of evidence, an entirely different position. The Government is differentiated, in a different position, in regard to keeping records of this kind.

(Mr. Nields here presents further argument and cites further authorities in support of his offer.)

(Mr. Biddle here presents further argument and cites further authorities in support of his objection to the books in evidence.)

(Mr. Nields here cites further authorities and presents further argument in support of his offer.)

(Mr. Biddle here presents further argument in support of his objection to the admission of the books in evidence.)

THE COURT: Gentlemen, the Court has listened with great attention and interest to what has been said on this point.

I think there is a misconception in the mind of counsel as to the relation of these books to the Government and as to the relation of the United States to the Chesapeake and Delaware Canal Company, as a stockholder. It is, undoubtedly, true, as already laid down by this Court on a previous occasion, and as also approved by the Circuit Court of Appeals, when the case went up, that when the Government becomes a stockholder in a private corporation, it is acting, and it must be treated to have acted, in a private capacity, and is to be treated like other stockholders with respect to its substantive rights in that corporation. For instance,

if the Government held ten shares of stock in a corporation, it could not insist upon the right—in voting that stock—to have that ten shares of stock counted twenty-five shares of stock, any more than could any private individual owning ten shares of stock insist upon such a proposition.

So it is perfectly true that with respect to its substantive rights as a stockholder, the Government is to be treated just like other stockholders. But that does not determine the character of the books. These are strictly public books, belonging to the Treasury Department, and which record, or should record, the moneys paid to the United States. It is not a question of stock, so far as books are concerned. It is a record of the payment of moneys received by the United States for public purpose, and the Court cannot conceive of any ground upon which these books, in their relationship to the recording or non-recording of the receipt of moneys which have been paid into the Treasury, or should be paid into the Treasury of the United States for public purposes, can, in any sense, can be regarded as the private books of the Government, in the sense of a private book belonging to an individual.

The Court, therefore, must regard these books as strictly public books, kept in the discharge of its Governmental functions, and intended to record the official transactions of the Government, and particularly the receipt of moneys which have been paid to the Government, and which, of course, becomes the money of the nation, not the money of the Government, in any sense, held as trustee for any individuals, but it goes into the Treasury of the United States for public purposes as the money of the nation.

I think these books are admissible, at least on one ground, and, probably, on two.

It is not contended, or suggested, by counsel on either side, so far as I know, that these books, or any

entries, or omission of entries, would be conclusive evidence. That is not suggested, and if it were suggested, the Court would have repudiated that idea instantly; but the Court believes that these books are evidence. They contain evidence which should properly be submitted to this jury in order to enable the jury to ascertain what? Why, the only point at issue in this case, whether those dividends, which it is submitted were due to the United States at one time, were paid to the United States. It seems to the Court that in the case of public books, kept by a sovereignty, against which no imputation can be brought of any desire to make false entries for its own benefit, as in the case of an individual, the fact that sworn officers, charged with the duty of faithfully recording the transactions of the Government's receipts and expenditures, have failed—if it be the case—to make any entry of the receipt of the dividends in question, is certainly evidence, for what it is worth, that those dividends were not paid to the Government. Of course, as I say, it is not conclusive evidence. The mere fact that there is no entry, if that be true, would not, in any way, preclude the defendant from showing, if it can, that those dividends were, in point of fact, paid; but it is, certainly, evidence which has a tendency—and it will be for the jury to say with what weight it is to be taken—to rebut the disputable presumption of payment arising from the mere lapse of time.

These Governmental books are not to be treated as books of account—unlike a charge that deals with goods sold and delivered—they are altogether on a different plane. They are kept by officers, and sworn officers, and employees, whose sworn duty it is to faithfully discharge their duty; and the cases are absolutely unlike the case of private individuals and the case of the public books of the United States.

In the case of *Holt v. the United States*, 218 United States, page 245, the Supreme Court said, in the course of its opinion:

"The deeds in condemnation proceedings, under which the United States claimed title, were introduced, and the witness relied in part upon the correctness of the official maps in the engineer's department, made from original surveys under the authority of the War Department, but not within his personal knowledge"—and he referred to a book—"The documents referred to are not before us, but they were properly used, and so far as we can see, justified the finding of the jury."

There was a criminal case involving conviction for murder committed on a military reservation of the United States, and the material point was to ascertain the appropriate use of the land on which the murder was committed.

In a case decided by the Circuit Court of Appeals in the Ninth Circuit, it was held: That where a map was offered in evidence, and showed on its face that it was issued from the General Land Office under the authority of the Secretary of the Interior, it was admissible without independent proof of evidence of accuracy or authenticity, to show the location of an Indian reservation on which it was claimed the homicide in question was committed.

Both of those cases were criminal cases, in which, of course, the rules of evidence are much more stringent than in a case of this kind.

I have suggested that there were, probably, two, certainly one, grounds upon which it seemed to the Court that these books were admissible.

The Government has produced witnesses who have testified as to where such a payment as a payment of dividends on stock, if made, should appear. I do not know whether there has been any testimony with re-

spect to describing particular books on that point. Has there?

MR. NIELDS: There has been; yes, sir.

THE COURT: The recollection of the Court is that the witness, or witnesses, stated that if such dividends had been received, they would or should have appeared in certain books, that that was the appropriate place; but the attorney for the United States advanced the proposition of what he proposed to show the jury, and that is, that there was no record anywhere in any of the books of the Government showing the receipt of these dividends. Well, suppose that to be true, that there is no evidence in any of the books of the Government showing the receipt of dividend? Certainly, that would be a question properly to be considered by the jury; and it seems to the Court that, entirely aside from the question, the real question, as to how far those books might be sufficient evidence of an affirmative proposition, the attorney for the United States should be permitted to show before this jury, if he can, that nowhere is there any—nowhere in any books of the Government—entry showing the receipt of these dividends. I do not know whether he can do it, or not, and whether that proposition includes more than he may be able to do. But now here, these books have been stated, by witnesses, as being the proper place in which to find certain entries if certain receipts had been had. Suppose it does not appear? Suppose it does not appear in the other books, which could be testified to? As I say, suppose it does not appear at all? That is a matter, it seems to the Court, which it is important the jury should take into consideration, not as conclusive, but taking it as sensible, reasonable men in the course of human probabilities. They are entitled to draw their inference.

On the other ground too I am strongly inclined to think that these books are admissible as public books,

and that it would be utterly impracticable to apply to the public records of the United States the same rules of evidence which are applicable to the books of private parties.

On all the grounds I think these books are admissible in evidence for what they are worth, for the purpose stated.

(Exception noted for defendant.)

MR. C. BIDDLE: It is understood that these books are not to spread upon the record, but are to be subject to the call of either party when they desire to see them?

THE COURT: Undoubtedly. The Court sees no reason why those books should be treated as though they were to be copied in extenso, in the case of any ulterior proceeding; but if they are admitted in evidence, of course the Government will then have a right to show, by any competent witness, who has examined those books, as to whether they do or do not contain certain material things.

Now, then, the books are here; the books are not to be taken away, but are in evidence. Then the defendant has a perfect right to go into any of those books, and if the defendant can show that those books, or any of them do contain what the witness says they do not contain, the defendant has a right to prove it.

MR. C. BIDDLE: I was looking to the case of an appeal. The books would be subject to call of the defendant upon appeal, without having them spread upon the record?

THE COURT: That is what I was referring to when I said "ulterior proceeding." I suppose that would be a matter of arrangement between counsel in the case. I should suppose counsel in the case, unless there is conflict of opinion between the witnesses—if, for instance, a witness on behalf of the Government would

say, after search, that he could not find any entry of a specific character, and you should produce a witness who testified after diligent search, he did find an entry of such a character, then you would have to accommodate yourself to that condition of evidence. I do not see any reason in the world why those books should be copied, or for that matter, sent up, unless it is desired. The Court will do everything in its power to facilitate the counsel in the case, in reference to appeal, or anything.

(The books admitted in evidence, subject to objection, are marked respectively, "Government's Exhibit No. 78", "Government's Exhibit No. 79", "Government's Exhibit No. 80", "Government's Exhibit No. 81", "Government's Exhibit No. 82", "Government's Exhibit No. 83", "Government's Exhibit No. 84", "Government's Exhibit No. 85", and "Government's Exhibit No. 86.")

HENRY C. PEARSON.

HENRY C. PEARSON, a witness on behalf of the Government, again taking the stand, his direct examination is resumed as follows:

By MR. NIELDS:

Q. Mr. Pearson, I will ask you whether or no, if sums of money representing dividends, paid by the Chesapeake and Delaware Canal Company, were received by the United States after June first, 1873, would they appear in those records?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.
(Exception noted for defendant.)

Q. Have you examined these records, being Government's Exhibits Nos. 78 to 86, both inclusive?

A. I have.

Q. You have?

A. Yes, sir.

Q. Do you find a record of any payment made by the Chesapeake and Delaware Canal Company for any dividend declared by it to the United States after June first, 1873?

MR. C. BIDDLE: I object to the question as being incompetent and improper.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

MR. C. BIDDLE: It is understood between counsel that all of this witness' testimony is taken subject to the objection of defendant's counsel that it is irrelevant, incompetent hearsay and inadmissible.

Q. From the examination you have made of Government's Exhibits Nos. 78 to 86, inclusive, did you find any entry of a sum of money paid to the United States by the Chesapeake and Delaware Canal Company, or the Delaware and Chesapeake Canal Company, during the period covered by these exhibits?

A. I did.

Q. From the examination that you made of Government's Exhibits Nos. 78 to 86, both inclusive, did you find any record of the receipt of any payment to the United States after June first, 1873, by the Chesapeake and Delaware Canal Company, or the Delaware and Chesapeake Canal Company?

A. I did not.

Q. Mr. Pearson, here are certain books marked for identification A-11, A-12, A-13 and A-10. Will you state to the Court and jury what these books are?

A. Those are Registers of Miscellaneous Revenue Warrants from the year July first, 1872, to December thirty-first, 1878.

Q. What are these called?

A. Registers of Miscellaneous Counter Warrants—the original record.

Q. Where is it kept?

A. It is kept in the office of the Division of Book-keeping and Warrants.

Q. Where?

A. In my charge; in my room.

Q. In the Treasury Department?

A. In the Treasury Department.

MR. NIELDS: I offer in evidence these four volumes covering a period from July first, 1872, to December thirty-first, 1878, being books marked for identification A-10, A-11, A-12, and A-13.

THE COURT: For what purpose?

MR. NIELDS: To show the non-receipt of any sum of money on account of these dividends sued for in this case.

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

(The four volumes just offered are admitted in evidence and marked respectively, "Government's Exhibit No. 87", "Government's Exhibit No. 88", "Government's Exhibit No. 89" and "Government's Exhibit No. 90".)

Q. Mr. Pearson, should there appear of record in these books marked Government's Exhibits Nos. 87 to 90 both inclusive, entries showing the payment of sums of money on account of dividends by the Chesapeake and Delaware Canal Company, after July first, 1873?

A. There should.

Q. Have you examined these four books to ascertain whether or no there be such entries?

A. I have.

Q. Is there any entry showing the receipt of any sum of money on account of dividends by the United States from the Chesapeake and Delaware Canal Company after July first, 1873?

A. I have no record.

Q. After June first, 1873?

A. After June first?

THE COURT: Repeat the question.

Q. Is there any entry showing the receipt of any sum of money on account of dividends by the United States from the Chesapeake and Delaware Canal Company, after June first, 1873?

A. The records do not show.

Q. Do these records, these four exhibits, Government's Exhibits Nos. 87 to 90, both inclusive, contain any entry showing the receipt by the United States of any sum of money on account of dividends from the Chesapeake and Delaware Canal Company after June first, 1873?

A. They do not.

Q. Will you state to the Court and jury what this book is?

A. That is a combination of all the receipts of the Government, and from various sources, by fiscal years, from 1789, the formation of the Government, up to 1905 or 1906, and in one case 1913.

Q. Where is this book kept?

A. It is kept with the others, right in my charge.

Q. In the Treasury Department of the United States?

A. In the Treasury Department of the United States, yes, sir.

MR. NIELDS: I ask that this be marked for identification.

(Book marked for identification, "Government's Exhibit No. 14-A" as of this date.)

I now offer that in evidence.

THE COURT: For what purpose?

MR. NIELDS: For the purpose of showing non-receipt, by the United States, of any sum of

money after June first, 1873, on account of dividends from this defendant.

THE COURT: During the period covered by the book?

MR. NIELDS: Yes, sir.

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

(Book admitted in evidence, subject to the objection, and marked, "Government's Exhibit No. 91".)

By A JURYMAYAN:

Q. Does that book there bear the same relation to your method of accounting as a general ledger in a mercantile business does to their methods of accounting? Would it be considered as a general ledger in a mercantile set of books?

A. No, sir. That is a general receipt and register for our convenience.

Q. And is made up from entries in other books?

A. From entries in the original register.

Q. Entries from other books are condensed in that book?

A. Yes, sir; for ready reference.

Q. From what books are the original entries posted into that book, can you tell me that?

A. From the annual receipts and expenditures.

Q. What books here represent that? Are there any books here representing those that are posted into this book?

A. Yes, sir. Naturally, one fiscal year would be in that book and a fiscal year in this would be in that book; the same verify each other.

Q. Are the entries taken from this book and put into that book?

A. No, sir. They are taken from this register

here of receipts and expenditures. That register contains the same work. I take it from this register.

Q. I wanted to find out, if the contingency should arise, which would make it necessary for us to trace back from this book the payments that might have been received from the Chesapeake and Delaware Canal Company; where we should go to get that information.

THE COURT: You want to know?

A JURYMAN: I want to know from this book in evidence, if we go to that book, and in this book there is a condensed statement, as he has testified, of certain payments in this case from the Chesapeake and Delaware Canal Company—where should we go from that book to trace back the original entries of those things?

MR. NIELDS: Of course, the certificates of deposit and daily transcripts of receipts, where these fourteen dividends were paid, are in evidence; and next, the covering warrants are the next step, and they are in evidence; then these books, which are compiled from the covering warrants, are in evidence, and the compilation of those books is from those. So you go right back to the source of the original record, all of which is in evidence from here back to the original receipts.

MR. C. BIDDLE: I do not think he (Mr. Nields) has answered this juryman at all. This juryman wants to know how he can go back to the original books in which the entries of these payments would have been made when they were made.

By THE COURT:

Q. Do you understand the question addressed to you by the juryman?

A. I do.

Q. What is your answer to it? You said "these" and "those" without indicating by name what "these" mean or "those" mean?

A. From the receipts and expenditures, your Honor, I stated.

MR. NIELDS: We haven't quite got to the sources from which entries in this particular book were made.

THE COURT: Are you now introducing or coming to those sources?

MR. NIELDS: Yes, sir.

THE COURT: That will answer your point (addressing the juryman who has been asking the questions)?

A JURYMAN: Yes, sir.

THE COURT: You propose to do that?

MR. NIELDS: Yes, sir.

Q. Should there appear in this book, marked "Government's Exhibit No. 91", an entry showing a receipt by the United States of any payment on account of dividends by the Chesapeake and Delaware Canal Company, after June first, 1873?

A. There should.

Q. Is there any entry here showing such a payment?

A. There is not.

Q. Will you go, now, to the record to which you referred as the source of the entries in Government's Exhibit No. 91?

A. What year?

Q. What years are covered by those books?

A. 1848 to 1854.

Q. Beginning with the year showing the receipts of money by the United States after June first, 1873, the actual receipt of money?

A. That register is over there.

Q. These are already in evidence?

A. That starts July first, 1872, and it runs to June thirtieth, 1873 (having reference to Government's Ex-

hibit No. 87). That is the last one where there is any appearance.

Q. I will ask you whether Government's Exhibits Nos. 87, 88, 89 and 90 are the original sources of information, covering the periods as shown by those books, used in making the entries in Government's Exhibit No. 91?

MR. C. BIDDLE: I object, as being leading and improper. I object to his saying what these books are. It is for this jury to determine whether they are the original records, or not.

THE COURT: The objection is overruled, upon the ground that the counsel has fullest opportunity, on cross-examination, to test the knowledge of the witness.

(Exception noted for defendant.)

A. That I cannot answer in two or three words. That first book there, Government's Exhibit No. 87, contains an original record of the two dividends declared on June second, 1872, and on May ninth, 1873; and that is the last record made on that book, Government's Exhibit No. 91.

Q. Will you point out the exact entry about which you are referring (having reference to Government's Exhibit No. 91)?

A. I refer to this entry, 1873, of two dividends of forty-three thousand eight hundred and seventy-five dollars each, declared in the years 1872 and 1873. They were covered in these files, these exhibits Nos. 88 and 89, because there could not be any posting there, there being no dividend subsequent to 1873.

Q. Under this item, 1873, forty-three thousand eight hundred and seventy-five dollars. Is that confined to the receipts of the United States for the fiscal year ending 1873?

MR. C. BIDDLE: I object.

Q. What is it confined to?

MR. C. BIDDLE: I object, because this witness has not shown his competency to prove the contents of those books.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

A. It contains the two dividends in this book (having reference to Government's Exhibit No. 87).

Q. Will you refer to those two dividends?

A. Here is the first. Shall I read it?

Q. Read what there appears.

A. This is a deposit by the Honorable George S. Boutwell, Secretary of the Treasury, on account of dividends by the Chesapeake and Delaware Canal Company, deposited November second, '72, for the amount of twenty-one thousand nine hundred and thirty-seven dollars and fifty cents.

Q. You mean 1872?

A. 1872.

Q. That was a receipt in November, 1872?

A. Yes, sir.

Q. When was the next receipt by the United States?

A. By warrant No. 1345 of the Chesapeake and Delaware Canal Company's dividend on stock held in that company on May ninth, 1873, for a like amount.

Q. Was that the date of payment to the United States?

A. I think it was. The date of deposit, that might have been a day before, or two days before.

Q. Before the date of deposit?

A. Yes, sir.

Q. Those two payments, one in November, 1872, and the other in May, 1873, where are they represented?

A. By that total receipts for the fiscal year 1873 under that heading "Dividend" on the stock of the Chesapeake and Delaware Canal Company.

Q. In Exhibit No. 91, the last entry on that book, on page 146, opposite the year, 1873, is what you have been testifying about?

A. Yes, sir.

CROSS-EXAMINATION.

By MR. C. BIDDLE:

XQ. Mr. Pearson, you, of course, made a mistake when you read that entry, because you said it read, "Chesapeake and Delaware Canal". You didn't mean that, but you meant just the reverse, "The Delaware and Chesapeake Canal"; am I right?

A. Read it the other way about.

XQ. Is that a mistake of yours? Answer the question.

A. It is a clerical error.

XQ. Is that a mistake of yours? Answer the question.

THE COURT: Let the question be repeated.

XQ. Was not that a mistake of yours in reading that "Chesapeake and Delaware Canal"?

A. No, sir; it was not.

XQ. Will you just read it for me again?

A. I know what you have reference to.

XQ. Read it, now, and see how it is written.

A. All right. Then I will explain why I read it that way. It reads, "Delaware and Chesapeake Canal Company". Will you allow me to say that I am conversant with the Chesapeake and Delaware Canal Company in all my accounts, and that is a clerical error by a clerk, which clerk is not in the Department now. I don't care what the record gives, that is a clerical blunder, because I have all of my headings, "Chesapeake and Delaware Canal Company". That is the reason why I used it.

XQ. Will you please produce the book in which it is in that heading?

A. The book in controversy; this exhibit here.

(Witness turns to Government's Exhibit No. 91, "Chesapeake and Delaware Canal Company", page 146; dividend on stock held by the United States in the "Chesapeake and Delaware Canal Company".

XQ. That is the one book you refer to?

A. Every book, except the registers, except where there was a clerical error made by the clerk.

XQ. In every other book isn't it spoken of as "Delaware and Chesapeake"?

A. No, sir.

XQ. Just look at the other entries and let us see how they are.

A. That is George S. Boutwell——

XQ. I don't care who it is. You just look at the entries in any other book but that one there and see how it is written.

A. All right; if you will permit me.

XQ. Any of the Registers that have been offered in evidence I mean. I call your attention to the Government's Exhibit No. 78, and will ask you to tell us how it is written in that exhibit?

A. That is a printed record.

XQ. Will you answer that question?

A. In the printed record——

XQ. I ask you how it is written in that exhibit which is now before your eyes.

A. This is the one entry——

XQ. Answer the question.

A. I don't know until I look.

XQ. Can't you look and see?

THE COURT: You must answer the question directly. The counsel has a perfect right to address that question to you.

A. (Continued.) That is all right; excuse me

your Honor. Sometimes those names of the company—

THE COURT: All the counsel asks you to do is to read the name as it appears there.

A. (Continued.) From dividend on stock, Delaware and Chesapeake Canal Company, held by the United States.

XQ. That is all right. That is all I wanted you to do, sir. As I understand you your official title is that of Custodian of the Records in the Secretary of the Treasury Department?

A. It is not.

XQ. What is it?

A. Bookkeeper.

XQ. Bookkeeper?

A. Yes, sir.

XQ. What duties, as bookkeeper, do you have to perform?

A. I write the re-pay and receipt covering warrants of the department; I prepare them and record them in the warrant book.

XQ. What other duties, as bookkeeper, have you?

A. To make out statements; prepare statements for the Secretary of the Treasury of the receipts of the Government.

XQ. I will ask you what books you keep other than that one book, to which you have referred?

A. What other books?

XQ. Yes.

A. I keep the receipts ledger.

XQ. What other books?

A. The receipts ledgers, registers of customs, lands, custom revenue and receipt warrants—all of them; and also re-pay warrants.

XQ. Your bookkeeping consists of keeping a record of warrants?

A. Yes, sir.

XQ. Are these books, Exhibits Nos. 78, to 83, and similar books in your custody?

A. They are. I have them ready as reference there to substantiate other receipts.

XQ. You mean to say you have copies of these?

A. I have those. Those were taken from behind my desk, from a closet, on shelves.

XQ. You gave us yesterday a certificate, or read a certificate, which you said substantiated the entries in these various books at which you were looking. I do not see that certificate on any of the books in evidence. Can you point that out to me, if it is there?

A. Will you repeat that question?

XQ. You gave us yesterday a certificate, or read a certificate which you said substantiated the entries in these various books at which you were looking. I do not see that certificate on any of the books in evidence. Can you point that out to me, if it is there?

A. The certificates are in charge of myself, and—

XQ. I repeat the question: You gave us yesterday a certificate, or read a certificate, which you said substantiated the entries in these various books at which you were looking. I do not see that certificate on any of the books in evidence. Can you point that out to me, if it is there?

A. I cannot. I thought the other answer was sufficient.

XQ. We have been told here that all the dividends of the Chesapeake and Delaware Canal Company, except one, were paid to the Sub-Treasurer in Philadelphia. Do you know how the Sub-Treasurer, at Philadelphia sent on to Washington the amount of his receipts?

A. I do not.

XQ. You do not?

A. No, sir.

XQ. Do you know where his accounts or copies of his books, would be sent, if sent, to Washington?

A. You have reference to the Assistant Treasurer in Philadelphia?

XQ. Yes.

A. They would be sent to the First Auditor; Auditor of the Treasury now called.

(At 1.00 o'clock P. M. a recess was taken until 2.00 o'clock P. M., same day.)

2.00 o'clock P. M. Same day.

HENRY C. PEARSON.

HENRY C. PEARSON, a witness in behalf of the United States, again taking the stand, his cross-examination is resumed as follows:

By Mr. C. BIDDLE:

XQ. Mr. Pearson, this printed report of Mr. MacLennan, which has been offered in evidence, Exhibits Nos. 78 to 86, is your own private copy of this report, is it, which you have kept for ready reference back of your desk?

A. Yes, sir.

XQ. How many copies of this does the Government print, about?

A. It is hard for me to tell. Probably twenty-five or thirty volumes of it. They publish the little ones, but this comprises four or five years. I suppose three or four hundred of them are published.

XQ. That is to say, Exhibits 78 to 86, of those exhibits there are three or four hundred, of each one of those reports, published?

A. Published in a pamphlet.

XQ. I suppose, of course, the original records and

books from which these reports are taken are found in the various departments to which they refer?

A. Yes, sir; if they want to refer to them.

XQ. I suppose this being your private copy would explain all these various ink additions to this. Are these ink additions in your handwriting?

A. Let me look at them. Yes, sir.

XQ. At various other places in the book I see therein another page with a great many additions. I suppose that is all in your handwriting?

A. Yes, sir.

XQ. You used this as your private memorandum?

A. Yes, sir; for posting purposes; for posting in that big book (pointing to book on table).

XQ. I see, by turning to Exhibit No. 91, certain entries are made there as to dividends on the stock of the Chesapeake and Delaware Canal Company; and I see, for example, 1873, forty-three thousand eight hundred and seventy-five dollars, and a total footing up of dividends, which have been paid by the Canal Company to the United States, of two hundred and fifty-nine thousand eight hundred and seventy-five dollars. Will you tell us where you got those figures from, and if you can point out the book and the place? First of all, is that in your handwriting?

A. I do not think it is. No, sir.

XQ. I ask you to look at it.

A. None of it.

XQ. Do you know whose handwriting it is?

A. Yes, sir.

XQ. Then this book was not kept by you?

A. No, sir; Mr. Jamison is dead.

XQ. Then you think Mr Jamison kept this?

A. I know he did.

XQ. You don't know where Mr. Jamison got his figures from?

A. Yes, sir.

XQ. Can you show us here?

A. Yes, sir.

XQ. Have we in evidence any of those receipts and expenditures?

MR. NIELDS: No.

A. Mr. Jamison made them. We have those in the box there (pointing to table).

XQ. Do you know that yourself?

A. Yes, sir. I was in the room with him, in the Register's office.

XQ. He got that from some printed volumes?

A. Yes, sir; of receipts and expenses.

XQ. Which were published by the different departments?

A. No, sir; published by the Secretary of the Department.

XQ. That is where he got them from?

A. Yes, sir.

XQ. You said something about having some other books in your custody. You refer to the printed volumes of these various expenditures that have been printed by the Government?

A. Yes, sir.

XQ. And copies of those are generally furnished each department of the Government?

A. Yes, sir.

XQ. You with the other departments each have a copy?

A. Oh, yes.

MR. NIELDS: If the Court please, there has been repeated reference in this case to the fourteen dividends paid, the total dividends being seventeen in number. In order that the jury may have available all the evidence, I desire to offer the pages of the minute books, or, rather, the entries on the various pages of the minute books setting out the declarations of dividends 1 to 14, inclusive.

THE COURT: The minute books of the defendant?

MR. NIELDS: Yes, sir. Those portions only which refer to the declarations.

MR. C. BIDDLE: I object.

MR. NIELDS: The purpose of the offer is that the declaration and date of payment of the dividend is indicated in the declaration; that is, the date when it was payable; and I desire to show that the files of the United States are full, complete and accurate, as shown with reference to the minute book designating the declaration of dividend.

MR. C. BIDDLE: It is understood, I suppose, that the declaration of a dividend only is offered in evidence, and that that can be incorporated in the minutes of the trial here?

MR. NIELDS: That is all.

THE COURT: Having the same arrangement you had in regard to the other books; is that what you have referred to?

MR. C. BIDDLE: Yes, sir. I will have to ask you to let me continue my objection all through and give me the usual exception.

THE COURT: Let the objection be continued and let the exception be noted.

(Exception noted for defendant.)

(Pages of minute books referred to, admitted in evidence, subject to the objection, and marked "Government's Exhibit No. 92".)

MR. NIELDS: I offer in evidence the pages of the dividend receipt book relating to dividends 1 to 14, both inclusive—this is the dividend receipt book of the Canal Company—to show that the records of the United States are full, accurate and complete in regard to all dividends declared and received by the United States.

THE COURT: A dividend receipt book?

MR. NIELDS: A dividend receipt book of the Chesapeake and Delaware Canal Company.

THE COURT: Receipts by whom?

MR. NIELDS: Receipts by the United States, of dividends 1 to 14, inclusive.

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

(Dividend receipt book of the Chesapeake and Delaware Canal Company admitted in evidence, subject to the objection, and marked "Government's Exhibit No. 93".)

GOVERNMENT RESTS.

ON BEHALF OF THE DEFENDANT.

MR. GRAY: I want to move to strike out Government's Exhibits Nos. 11, 12, 13, 14, 16, 16-A, 16-B, 16-C and 66.

May it please the Court, my reason for making the motion that those exhibits be stricken out is that these papers produced here, were produced under a *duces tecum* by the secretary of the Chesapeake and Delaware Canal Company, and they are papers which were presented by my friend with the theory that he would rebut the presumption of payment, or some such presumption, from those papers.

Now he produces the witness Wilson on the stand who testifies that he and Henry V. Leslie, in a scheme to embezzle moneys from the Government, prepared these exhibits that I have mentioned, including the entries in the dividend receipt book. On the ground that where an agent is acting outside of the scope of his authority, the principal cannot be bound by his actions.

I move to strike those exhibits out in view of the further evidence of the Government.

THE COURT: I do not understand this question of agency, at all.

MR. GRAY: Mr. Nields tendered these various documents, as I understand it, on his theory that they were exhibited by the Canal Company, as evidence of payment. In the first place, we deny that they were exhibited as evidence of payment. Mr. O'Reilly testified that he went to the Canal Company—if my recollection serves me rightly—at a date subsequent to the institution of this suit with a letter from the Secretary of the Treasury to inspect the books and papers of the Canal Company; that he inspected them and he found those papers in the Canal Company's office.

You will recollect that Mr. Wilson said, so far as these letters and vouchers were concerned, that they were simply prepared by him and Mr. Leslie and an assistant and kept in their own possession in case it would be necessary to use them.

They were tendered by Mr. Nields on the theory, and on the only theory that I can imagine, that if a person suppresses evidence, or produces false or forged evidence, that it may be taken as an admission against them, or proof of forgery and falsification. I think you will find that doctrine set forth in Wigmore, Section 278, if I am correct, and in various other text writers; and they cite quite a number of cases—if your Honor will examine those cases—as also the English text writers.

(Mr. Gray here presents further argument in support of his motion to strike out.)

That being so, these exhibits here are exhibited by the Government, and not by us, and they are immaterial. I therefore ask that they be stricken out.

THE COURT: The Court declines to grant the motion.

(Exception noted for defendant.)

MR. C. BIDDLE: The defendant has no evidence to offer.

BOTH SIDES CLOSE.

At the conclusion of the evidence in the case the counsel for the defendant requested the Court to instruct the jury as follows:

1.

That the Court direct the jury to return a verdict for the defendant.

2.

As the United States became a stockholder in the Chesapeake and Delaware Canal Company, **they are** subject to all the rules and regulations governing other stockholders in that company.

3.

The United States brings suit as a stockholder of the Chesapeake and Delaware Canal Company; it has, therefore, no higher rights of recovery against that corporation than has any other stockholder of that company.

4.

The United States cannot disregard the duties and obligations which attach to the transaction of a business in which they have become engaged and if they have been guilty of laches to the injury of the defendant they cannot recover.

5.

When the United States becomes an actor in a court of justice their rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and may by their conduct be estopped from recovering.

6.

The Government is subjected to the same rules respecting the burden of proof, and quantity and character of evidence, the presumption of law and fact, that attend the prosecution of a like action by an individual.

7.

The presumption of payment arising from the lapse of time is a presumption of fact and the evidence to overcome it must continue through the twenty years preceding the time when suit was brought.

8.

When a presumption of payment has arisen by reason of the lapse of twenty years, it gathers strength by additional years and can only be rebutted by clear and undoubted evidence, and the burden of producing this evidence is upon the plaintiff.

9.

If no proceedings have been instituted to secure payment of a claim for twenty years, time has written upon the face of the claim a receipt, which is made stronger if no recognition of the claim has been obtained for thirty-five years, as in the present case. The burden is upon the plaintiff to show that the receipt thus written on the claim is invalid, otherwise they cannot recover.

10.

The law presumes a payment after the lapse of twenty years and will not permit a recovery unless the evidence offered to prove that the claim is still unpaid is in the opinion of the Court sufficiently strong, if believed, to rebut the presumption of payment.

11.

The Government has long delayed asserting its rights as a stockholder of the defendant company without showing any sufficient reason or excuse for the delay, therefore they cannot recover interest in this case.

12.

The books of the Government are not evidence to show by the absence of entries thereon that these dividends were not received, nor can the presumption of payment be rebutted by evidence of a negative character; the books are only evidence in regard to affirmative or positive entries either of debit or credit.

13.

Under the law and the evidence in this case the verdict of the jury must be for the defendant.

14.

If you believe that the evidence shows that the Government failed to receive its dividends because a person authorized to act for it appropriated the money to his own use, the defendant is not responsible for the loss.

15.

If you believe that an employee of the Government embezzled these dividends when they came into his hands, the plaintiff cannot recover.

16.

If you believe that by reason of the laches or carelessness of the employees of the Government of the United States failed to take any action to recover these dividends during the twenty years prior to the beginning of this suit and has shown you no reason for this delay and the defendant has made no acknowledgment of the debt, the plaintiff is not entitled to recover in this case.

17.

If by reason of the laches of the employees of the Government, the Government has failed during the twenty years prior to the bringing of this suit to do

that which the law says it must do to rebut the presumption of payment, your verdict must be for the defendant.

18.

The longer the Government has delayed in taking any steps to recover these dividends the stronger is the presumption of payment, and where over thirty years have elapsed the evidence to rebut the presumption must be clear and convincing.

Whereupon, the Court declined to instruct the jury in the language of the proposed instructions, and thereupon charged the jury as follows:

CHARGE OF THE COURT.

THE COURT: Gentlemen of the jury,—The case now on trial is an action brought by the United States against the Chesapeake and Delaware Canal Company to recover the amount of certain dividends declared on shares of stock of that company held and owned by the United States at the time of the declaration thereof, and still held and owned by the United States. It is not disputed, but on the contrary, proven and admitted that the shares of stock so held and owned by the United States were and are fourteen thousand six hundred and twenty-five in number, and that June ninth, 1873, a dividend was declared on the shares of stock so owned by the United States amounting to twenty-one thousand nine hundred and thirty-seven dollars and fifty cents, payable June thirtieth, 1873; and further that June eighteenth, 1875, a dividend was declared on the said shares of stock amounting to fourteen thousand six hundred and twenty-five dollars, payable June thirtieth, 1875; and further that June fifteenth, 1876, a dividend was declared on the said shares of stock amounting to fourteen thousand six hundred and

twenty-five dollars, payable June thirtieth, 1876; the above-mentioned three sums aggregating fifty-one thousand one hundred and eighty-seven dollars and fifty cents. It is admitted that the above-mentioned three dividends, at the time they respectively became due and payable, were due and payable to the United States. The United States in this action sues for the recovery of the above-mentioned sum of fifty-one thousand one hundred and eighty-seven dollars and fifty cents, being the aggregate of the three dividends, together with interest thereon from November seventeenth, 1911, the date on which demand was made by the United States upon the Canal Company for the payment of the same.

This case turns upon the single question of payment or non-payment of the dividends by the Canal Company to the United States. It is the only disputed point for your consideration. If the dividends were paid by the Canal Company to the United States, as contended on behalf of the company, the United States has no claim to enforce in this action and your verdict should be for the defendant. On the other hand, if the Canal Company has failed to pay the dividends to the United States, as contended by the District Attorney, it is entitled to recover their amount in this action and your verdict should be for the plaintiff in an amount representing the sum of fifty-one thousand one hundred and eighty-seven dollars and fifty cents, together with interest thereon at six per cent. from November seventeenth, 1911, until the day of your verdict.

Where a pecuniary demand becomes due and payable and the person entitled to sue for and recover the same omits to sue for a period of twenty years or more, a presumption arises at the expiration of the period of twenty years that such pecuniary demand has been in point of fact paid to the person entitled to receive the same and this presumption, arising at the expiration

of twenty years from the time the demand became due and payable, is a continuing presumption, increasing in strength with the lapse of time. The presumption, however, is not conclusive. It is disputable and can be rebutted by evidence, direct or circumstantial, oral or documentary. And in this regard the United States is subject to the same rules respecting the burden of proof, the quantity and character of evidence, and the presumptions of law and fact, that would apply in the prosecution of a like action by an individual. This action was brought March fourth, 1912. It is settled law, affirmed and re-affirmed by the Supreme Court of the United States, and laid down and recognized in this case both by this Court and the Circuit Court of Appeals, that there is no statute of limitations applicable to this action as prosecuted by the United States.

Where action is brought within the period of twenty years next after the accruing of the cause of action and the defendant claims that the demand brought against it has been paid, the defendant to sustain that defense must affirmatively establish by proof the fact of such payment. In other words, where suit is instituted within the period of twenty years the burden or onus of proof rests upon the defendant to make good the plea of payment. The effect of the disputable presumption arising from the lapse of twenty years after the accruing of the cause of action and before action brought is to relieve the defendant of the burden of making proof of payment in the first instance, and to impose upon the plaintiff the burden of proving that the claim he asserts has not been paid at any time prior to the bringing of suit. More than twenty years having elapsed since the dividends in question became due and payable and before the bringing of this suit, the burden of proof has not rested upon the Canal Company to prove payment, but has rested upon the United States to prove non-payment. The defendant has adduced no

evidence, but rests solely upon the disputable presumption of payment. This being a civil action and not a criminal prosecution, the law does not require proof beyond a reasonable doubt, but only a preponderance of evidence to establish the non-payment of the dividends. Had the suit been brought within the twenty years the defendant would have been required, in order to sustain a plea of payment, to produce only a preponderance of the evidence to support it, and as the result of the lapse of more than twenty years before the institution of suit is to impose upon the United States the burden of proving non-payment, equally that can be done by a preponderance of the evidence in the case, oral or documentary, direct and circumstantial. If the United States shows non-payment, it is sufficient. It is not necessary to show that the United States was hindered or prevented from suing earlier. Nor is it necessary to show that the officers of the United States were justified in waiting so long before bringing this suit or to explain just why suit was not brought earlier. The rule requiring proof beyond a reasonable doubt has no application to this case. Mere carelessness or negligence on the part of the officials of the United States in omitting earlier to institute proceedings for the collection of the dividends in question cannot, aside from the shifting of the burden of proof from the defendant to the United States as above mentioned, in any manner or to any extent constitute a defense to the claim made by the United States in this action, or injuriously affect the United States in its prosecution. Such is the settled law, and you are, therefore, instructed, if the United States has shown non-payment of the dividends, not to permit any idea or suggestion of mere laches, whether consisting of negligence or carelessness on the part of the officers or employees or agents of the United States in not sooner causing this action to be instituted, or in not earlier ascertaining or

discovering the fact that the dividends in question had been declared in favor of the United States, in any manner to influence your action as jurors in reaching a verdict in this case.

The Court has been requested by the counsel for the defendant to charge you in the following language:

“If you believe that the evidence shows that the Government failed to receive its dividends because a person authorized to act for it appropriated the money to his own use, the defendant is not responsible for the loss.”

And also,

“If you believe that an employee of the Government embezzled these dividends when they came into his hands, the plaintiff cannot recover.”

Of course, if these dividends were paid by the defendant to any person or employee authorized to receive the same on behalf of the United States, and were embezzled or misappropriated by such person or employee, the defendant should not be compelled to make double payment, and in that event your verdict should be for the defendant; but the Court does not recall any evidence in the case which could justify you in finding that any person authorized to act for the United States appropriated the dividends in question, or any part thereof, for his own use, or that any employee of the United States embezzled those dividends or any part thereof, or that the same were paid to any person or persons for or on account of the United States. This comment, however, by the Court is not intended in any manner or to any degree to affect or control your judgment or recollection as to this point. You are not in any way bound by any suggestion of the recollection of the Court touching the evidence or lack of evidence in the case, but are to use your own recollection or memory on the subject.

The Court has been requested to give you instructions on a number of points of law in the language employed by counsel. The charge of the Court embraces in substance all of the propositions suggested by counsel insofar as those propositions are, in the opinion of the Court, properly applicable to the case.

The Court forbears to review the evidence, oral, documentary, direct and circumstantial in this case. The testimony of witnesses and books and papers of the Treasury Department of the United States and of the defendant company are before you, and it is for you, and not for the Court, to draw from the direct evidence in the case all reasonable and proper inferences. This case should be decided by you, not upon mere or fanciful speculation, or guesses or possibilities suggested by the ingenuity of counsel, but upon the facts directly proven and reasonable, and not strained, deductions from them.

There is a *prima facie* presumption that public officers duly perform their duty, and consequently in favor of the regularity of their official acts and records. And this presumption applies to the acts and records of the Treasury Department of the United States.

The evidence has been so recently adduced before you and so fully discussed by counsel on both sides that it would be an affront to your memory and your intelligence should the Court now undertake to analyze or recapitulate it.

In this case, gentlemen, you will, of course, do exact justice on the evidence uninfluenced in any manner by the character or position of the parties respectively.

If on the evidence taken as a whole you find that the dividends in question have not been paid by the Canal Company to the United States you will find a verdict for the plaintiff in a sum equal to the fifty-one

thousand one hundred and eighty-seven dollars and fifty cents and interest thereon at the rate of six per cent. from November seventeenth, 1911, until the day of the rendition of your verdict. If you do not so find, your verdict should be for the defendant.

(Exception noted for defendant.)

Whereupon the defendant, through its counsel, excepted to the refusal of the Court to instruct the jury as above requested, and to certain of the portions of the charge, as follows:

(a) That the learned Judge erred in charging the jury as follows:

"The United States in this action sues for the recovery of the above mentioned sum of fifty-one thousand one hundred and eighty-seven dollars and fifty cents, being the aggregate of the three dividends, together with interest thereon from November seventeenth, 1911, the date on which demand was made by the United States upon the Canal Company for the payment of the same."

(b) That the learned Judge erred in charging the jury as follows:

"If the Canal Company has failed to pay the dividends to the United States, as contended by the District Attorney, it is entitled to recover their amount in this action and your verdict should be for the plaintiff in an amount representing the sum of fifty-one thousand one hundred and eighty-seven dollars and fifty cents, together with interest thereon at six per cent. from November seventeenth, 1911, until the day of your verdict."

(c) That the learned Judge erred in charging the jury as follows:

"It is settled law, affirmed and reaffirmed by the Supreme Court of the United States, and laid down and recognized in this case both by this Court and the Circuit Court of Appeals, that there is no statute of limitations applicable to this action as prosecuted by the United States."

(d) That the learned Judge erred in charging the jury as follows:

"The defendant has adduced no evidence, but rests solely upon the disputable presumption of payment. This being a civil action and not a criminal prosecution, the law does not require proof beyond a reasonable doubt, but only a preponderance of evidence to establish the non-payment of the dividends."

(e) That the learned Judge erred in charging the jury as follows:

"Had the suit been brought within the twenty years the defendant would have been required, in order to sustain a plea of payment, to produce only a preponderance of the evidence to support it, and as the result of the lapse of more than twenty years before the institution of suit is to impose upon the United States the burden of proving non-payment, equally that can be done by a preponderance of the evidence in the case, oral or documentary, direct and circumstantial."

(f) That the learned Judge erred in charging the jury as follows:

"If the United States shows non-payment, it is sufficient. It is not necessary to show that the United States was hindered or prevented from suing earlier. Nor is it necessary to show that the officers of the United States were justified in waiting so long before bringing this suit or to explain just why suit was not brought earlier."

(g) That the learned Judge erred in charging the jury as follows:

"The rule requiring proof beyond a reasonable doubt has no application to this case. Mere carelessness or negligence on the part of the officials of the United States in omitting earlier to institute proceedings for the collection of the dividends in question cannot, aside from the shifting of the burden of proof from the defendant to the United States as above mentioned, in any manner or to any extent constitute a defense to the claim made by the United States in this action, or injuriously affect the United States in its prosecution."

(h) That the learned Judge erred in charging the jury as follows:

"You are, therefore, instructed, if the United States has shown non-payment of the dividends, not to permit any idea or suggestion of mere laches, whether consisting of negligence or carelessness on the part of the officers or employees or agents of the United States in not sooner causing this action to be instituted, or in not earlier ascertaining or discovering the fact that the dividends in question had been declared in favor of the United States, in any manner to influence your action as jurors in reaching a verdict in this case."

(i) That the learned Judge erred in charging the jury as follows:

"The Court has been requested by the counsel for the defendant to charge you in the following language:

'If you believe that the evidence shows that the Government failed to receive its dividends because a person authorized to act for it appropriated the money to his own use, the defendant is not responsible for the loss.'

and also,

'If you believe that an employee of the Government embezzled these dividends when they came into his hands, the plaintiff cannot recover.'

Of course, if these dividends were paid by the defendant to any person or employee authorized to receive the same on behalf of the United States and were embezzled or misappropriated by such person or employee, the defendant should not be compelled to make double payment, and in that event your verdict should be for the defendant; but the Court does not recall any evidence in the case which could justify you in finding that any person authorized to act for the United States appropriated the dividends in question, or any part thereof, for his own use, or that any employee of the United States embezzled those dividends or any part thereof, or that the same were paid to any person or persons for or on account of the United States."

(j) That the learned Judge erred in charging the jury as follows:

"The Court has been requested to give you instructions on a number of points of law in the language employed by counsel. The charge of the Court embraces in substance all of the propositions suggested by counsel insofar as those propositions are, in the opinion of the Court, properly applicable to the case."

(k) That the learned Judge erred in charging the jury as follows:

"This case should be decided by you, not upon mere or fanciful speculation, or guesses or possibilities suggested by the ingenuity of counsel, but upon the facts directly proven and reasonable, and not strained, deductions from them."

(l) That the learned Judge erred in charging the jury as follows:

"There is a prima facie presumption that public officers duly perform their duty, and con-

sequently in favor of the regularity of their official acts and records. And this presumption applies to the acts and records of the Treasury Department of the United States."

(m) That the learned Judge erred in charging the jury as follows:

"In this case, gentlemen, you will, of course, do exact justice on the evidence uninfluenced in any manner by the character or position of the parties respectively."

(n) That the learned Judge erred in charging the jury as follows:

"If on the evidence taken as a whole you find that the dividends in question have not been paid by the Canal Company to the United States you will find a verdict for the plaintiff in a sum equal to the Fifty-one thousand one hundred and eighty-seven dollars and fifty cents and interest thereon at the rate of six per cent. from November seventeenth, 1911, until the day of the rendition of your verdict. If you do not so find, your verdict should be for the defendant."

Whereupon the Court allowed the defendant an exception to its refusal to charge in accordance with its prayers numbers 1 to 18, respectively, and also an exception to the charge of the Court on the ground of insufficiency, and also to the portions of the charge set out above, lettered respectively from a to n, both inclusive.

And thereupon comes the counsel for the defendant and prays the Court that, in accordance with the rules of the Circuit Court of Appeals for the Third Circuit, the Government Exhibits Nos. 16, 16-A, 16-B, 16-C, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, and 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, and 91, may be transported to the Circuit Court of Appeals as

part of the record in the said cause, and that the defendant shall not be required to have printed in the record copies of such exhibits, but that the originals transported to the Circuit Court of Appeals may be taken as part of the record in said Court in this cause.

And thereafter the counsel for the said defendant did tender this its bill of exceptions and did request the Judge of said Court in which the said cause was tried, to authenticate and sign the said bill of exceptions according to the form of the statute in such case made and provided, and which is done accordingly at Wilmington, in said District, this eleventh day of February, A. D. 1916.

(Sgd.) EDWARD G. BRADFORD,
*District Judge of the United States,
for the District of Delaware.*

GOVERNMENT'S EXHIBIT NO. 1.

THE CHESAPEAKE & DELAWARE CANAL CO.

Number 235.

11,250 Shares.

SHARES

CAPITAL STOCK.

This certifies that the United States of America is entitled to Eleven thousand two hundred and fifty Shares of the capital stock of

THE CHESAPEAKE & DELAWARE CANAL COMPANY transferable only on the Books of the Company in Person or by Attorney on the surrender of this certificate.

\$50. Each

(Seal of the
Chesapeake
and Delaware
Canal Compy.
Ars Junxt
Concordia
Tenet
Incorporated
1803)

IN WITNESS WHEREOF We have hereunto affixed our Hands and the Seal of the said Company at Philadelphia this fourteenth day of November, 1867.

ANDREW C. GRAY, *Prest.*

HENRY V. LESLEY, *Treas.*

(Endorsed: This Certificate issued in lieu of old certificates No. 780 and 785, both of which are lost, and No. 2685 surrendered to the Company together with the certificate of scrip, No. 212 for \$100. [Sgd.] Henry V. Lesley, Secretary.)

GOVERNMENT'S EXHIBIT NO. 2.

THE CHESAPEAKE & DELAWARE CANAL CO.

Number 560

3375 Shares

SHARES

CAPITAL STOCK.

This certifies that the United States of America is entitled to three thousand three hundred and seventy-five Shares of the capital stock of

THE CHESAPEAKE & DELAWARE CANAL COMPANY transferable only on the Books of the Company in

\$50. Each

Person or by Attorney on the surrender of this certificate.

(Seal of the
Chesapeake
and Delaware
Canal Compy.
Ars Junxt
Concordia
Tenet
Incorporated
1803)

IN WITNESS WHEREOF we have hereunto
affixed our Hands and the Seal of the
said Company at Philadelphia this
sixth day of December, 1869.

ANDREW C. GRAY, *Prest.*

HENRY V. LESLEY, *Treas.*

GOVERNMENT'S EXHIBIT NO. 3.

Dr.	THE UNITED STATES OF AMERICA.		Cr.
June 3 To New Stock, W. B.	N. C. 1866	By stock from fol. 326	
fol 116 Shrs	2812	Ledger A. Share	2250
	2685 October	1 By Stock dividend	
		W. Book fol. 113,	
		656	Share 562
"	2812		" 2812
		By Old Stock W. B.	
		fol. 116,	Shs. 11,248
	N. C. 1869	By Scrip—642	" 2
	560 Dec 6	Stock Dividend	
		W. B. fol. 120,	" 3,375

GOVERNMENT'S EXHIBIT NO. 4.

Office of the Chesap. & Delaw. Canal Co.

Philada. June 2d, 1873.

Monday morning.

Pursuant to the acts of Incorporation of the Chesapeake and Delaware Canal Company, a general meeting of the proprietors of the said Company was held at this office this day.

John R. Baker, Esqr., was called to the Chair, and Henry V. Leslie appointed Secretary.

The meeting proceeded to ascertain the number of shares represented, when the Chairman announced that there were present holders of more than Two Thousand Shares of Stock.

The minutes of the general meeting held June 3d,

1872, also, of the meeting held in December last were read and approved.

The President and Directors of the Company then laid before the meeting a full report of their proceedings for the past year, and a statement of the receipts and expenditures to the first inst., which were read, when on Motion, the following resolutions were unanimously adopted, viz.:

Resolved, that the Report and Statement be accepted and approved, and that the same be placed on the files of the Company.

Resolved, that the President and Directors cause the said Report, and so much of the statement as they may deem proper to be published in pamphlet form for the use of the proprietors.

Resolved, that a cash Dividend of Three per cent. be declared on the outstanding Capital Stock of the Company, payable to the Stockholders on and after the 9th inst.

On motion it was,

Resolved, that the meeting do now adjourn for the purpose of going into an election for a President and fourteen Directors to serve for the ensuing year and until others are chosen, and that the meeting re-assemble at noon of this day to hear the report of the Judges who shall now be appointed by the Chairman.

The Chairman appointed Messrs. J. Alex. Shriver and J. A. L. Wilson.

The meeting then adjourned.

GOVERNMENT'S EXHIBIT NO. 5.

Office, Chesap. and Delaw. Canal Co.

June 5th, 1876.

Pursuant to Charter and Public notice given in the States of Pennsylvania, Delaware and Maryland, a General Meeting of the proprietors of the Chesapeake

and Delaware Canal Company was held at their office in Philadelphia this day.

Joseph Swift, Esqr., was called to the Chair, and Henry V. Leslie appointed Secretary.

The Chairman stated that there were present in person holders of more than Two Thousand Shares of the Capital Stock of the Company.

The minutes of the General Meeting held in June last, also minutes of December 6th, 1875, were read, and on Motion were approved.

The President and Directors then laid before the meeting a full report of their proceedings and a statement of their receipts and expenditures since the last Annual Report and Meeting in June, showing in detail the proceedings of the Company, when

On Motion, it was

Resolved, that the Report and Statements this day presented by the Directors be accepted and the same placed on the files of the Co.

Resolved, that the Report and so much of the Statements as the President and Directors may deem proper, be published in pamphlet form for the use of the proprietors.

On motion, it was

Resolved, that a dividend of Two per cent. be declared on the outstanding capital stock of the company, payable to the stockholders on the fifteenth inst.

On motion, it was

Resolved, that the meeting do now adjourn for the purpose of going into an election for a President and fourteen Directors, to serve for the ensuing year and until others be chosen, and that the meeting reassemble at 11 o'clock 30 minutes of this day to hear the report of the Judges who shall now be chosen.

The Chairman appointed Messrs. Charles Norris and J. A. L. Wilson.

GOVERNMENT'S EXHIBIT NO. 6.

Office, Chesap. and Delaw. Canal Co.

Philad., June 7, 1875.

Pursuant to Charter and public notice given in the States of Pennsylvania, Delaware and Maryland, a General meeting of the proprietors of the Chesapeake and Delaware Canal Company was held at their office in Philadelphia, this day.

Arthur G. Coffin, Esqr., was called to the Chair, and Mr. Henry V. Leslie appointed Secretary.

The Chairman stated that there were present in person holders of more than Two Thousand Shares of Capital Stock of the Company.

The minutes of the General meeting held in June last, also minutes of the meeting held in December of 1874, were read and approved.

The President and Directors then laid before the meeting a full Report of their proceedings and a Statement of their receipts and expenditures since the last Annual Report and Meeting in June last, showing in detail the proceedings of the Company, when

On Motion, it was

Resolved, that the Report and Statements this day presented by the Directors be accepted and the same placed on the files of the Company.

Resolved, that the Report and so much of the Statements as the President and Directors may deem proper, be published in pamphlet form for the use of the proprietors.

Resolved, that a Dividend of Two percent be declared on the outstanding Capital Stock of the Company, payable to the Stockholders on and after the 18th inst.

On motion, it was

Resolved, that the meeting do now adjourn for the

purpose of going into an Election for a President and fourteen Directors to serve for the ensuing year and until others be chosen, and that the meeting reassemble at noon of this day to hear the report of the Judges who shall now be chosen.

The Chairman appointed Messrs. John R. Baker and J. A. L. Wilson.

The meeting then adjourned.

GOVERNMENT'S EXHIBIT NO. 7.

Office of the Secretary.

TREASURY DEPARTMENT

Washington, November 17, 1911.

The Chesapeake and Delaware Canal Company,
528 Walnut Street,
Philadelphia, Pennsylvania.

Sirs:

It satisfactorily appearing to me that you have denied the right of the United States to set off against tolls charged government vessels for use of your canal, an indebtedness of \$51,187.50 with interest, growing out of your failure to pay over to the United States their share of the dividends on your capital stock declared in the years 1873, 1875, and 1877, demand is hereby made upon you for the payment of the said sum of \$51,187.50, with interest at six per centum per annum on \$21,937.50 part thereof from June 30, 1873, till paid; and on \$14,625, another part thereof from June 30, 1875, till paid; and on \$14,625, the residue thereof, from June 30, 1877, till paid; it being my intention in case of failure by you to pay the sum above demanded, to cause a suit in equity to be instituted against you for the recovery of the said sum, in pur-

suance of the provisions of the act of March 3, 1875, Chap. 149 (18 Stat., 481).

Respectfully,

FRANKLIN MACVEAGH,
Secretary.

(Endorsement: CHESAPEAKE & DELAWARE CANAL CO.

Nov. 22, 1911

Noted by

Submitted to

ANSWERED

President

the Board

Noted by

Secy. & Treas.)

GOVERNMENT'S EXHIBIT NO. 8.

CHESAPEAKE & DELAWARE CANAL COMPANY.

Office, 528 Walnut Street.

Coleman L. Nicholson, Pres.

Walter Hall, Sec. & Treas.

Philadelphia, December 4, 1911.

Hon. Franklin MacVeagh:

Secretary of the Treasury,

Washington, D. C.

Sir:

We are in receipt of your favor of November 17th and are somewhat at a loss to account for its being written at this time. The subject of the dividends of 1873, '75, '77, was last under discussion between your Department and our Company as long ago as the year 1900, and since that time the United States Government have refused to pay bills for tolls that have been rendered them. By our acquiescing in this, and not taking any steps to recover these bills, it must not be understood that we in any way admit the validity of the alleged claim of the Government against this company.

We are advised by counsel that when the United States Government becomes a stockholder in a Company, it is not acting in its sovereign capacity and is bound by the Statute of Limitations, and subject to any defence that the Company may have against a stockholder. If the Government wish to change the situation by bringing suit, we of course cannot prevent it.

Respectfully,

C. L. NICHOLSON,
President.

(Endorsement: Mail and Files Division
Treasury Department

B & W R

B & W 6730
1911 Dec 5 5 AM 10 08

M & F R

TREASURY DEPARTMENT, L

December 6, 1911.

Respectfully referred, with all papers in the case,
to the Solicitor of the Treasury, for his consideration.

A. Piatt Andrew

M W

Assistant Secretary.

S. E.

SOLICITOR OF THE TREASURY, Rec'd Dec 8 1911 A. M. 9.
File No.

MAIL & FILE DIVISION.
TREASURY DEPARTMENT
1911 Dec 5 AM 10 08)

GOVERNMENT'S EXHIBIT NO. 9.

UNITED STATES OF AMERICA.

TREASURY DEPARTMENT,

April 28, 1914.

Pursuant to Section 882 of the Revised Statutes I hereby certify that the annexed is a true copy of the original on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

C. S. HAMLAN,
Assistant Secretary of the Treasury.
J. E. H.

TREASURY DEPARTMENT.

(Office of the Secretary)

Washington.

July 18, 1874.

Sir:

Your resignation as Principle Clerk of Warrants and Appropriations in the office of the Secretary of the Treasury to take effect on the 31st proximo, is received and accepted accordingly.

I am very respectfully,

B. H. BRISTOW,
Secretary.

MR. R. H. T. LEIPOLD.

GOVERNMENT'S EXHIBIT NO. 10.

Page from Letter-press Book endorsed "Press Copies
of Letters. Miscellaneous. Sept. 1 to Oct. 31,
1871, inclusive. Loan Branch. Treasury
Department."

GP S
LC \$21,937.50 Treasury Department
October 26th 1871

Henry V. Lesley Esq.
Treasurer

Chesapeake and Delaware Canal Company
At sight please pay to George Eyster U. S. Asst.
Treasurer at Philadelphia Pa or order for deposit
to the credit of the Treasurer of the United States
the sum of Twenty one thousand nine hundred and
thirty seven 50/100 dollars being dividend on stock
in the above-named Company held by the United
States

(Sgd.) J. F. HARTLEY,
Acting Secretary.

GOVERNMENT'S EXHIBIT NO. 11.

TREASURY DEPARTMENT.

Nov 19th 1875

Sir

I am directed by the Sec'y to acknowledge the
receipt of your letter of the 17th inst. containing check
for fourteen thousand six hundred and twenty five
dollars being for a dividend in the stock of the Ches-

peake & Delaware Canal Co. now owned & held by the
United States

\$14.625

Very Respectfully,

A. V. HOLMES,

Assist. Sec'y.

To

HENRY V. LESLEY, Esq.,

Sec'y & Treasurer,

Chesapeake & Delaware Canal Co.

Philadelphia.

[Endorsed: "United States Divd June/75".]

GOVERNMENT'S EXHIBIT NO. 12.

TREASURY DEPARTMENT.

\$21,937.50

October 26th 1874

Henry V. Lesley Esq.

Treasurer

Chesapeake and Delaware Canal Company.

At sight please pay to George Eyster U. S. Asst.
Treasurer at Philadelphia Pa or order for deposit to
the credit of the Treasurer of the United States the
sum of Twenty one thousand nine hundred and thirty
seven 50/100 dollars being dividend on Stock in the
above-named Company held by the United States.

J. F. HARTLEY,

Acting Secretary.

[Endorsed: "United States June/73 Geo Eyster,
Asst. Treas, U. S. (Divd June 1873)."]

GOVERNMENT'S EXHIBIT NO. 13.

TREASURY DEPARTMENT.

\$14,625—

November 27th 1877

Pay to the order of George Eyster Esq. Assistant Treasurer of the United States at Philadelphia the sum of Fourteen Thousand six hundred and twenty five dollars, amount of Dividend declared on the Stock held by the United States in the Chesapeake & Delaware Canal Co.

CHAS. W. HAYES,
Assistant Sec'y.

To

HENRY V. LESLEY, ESQ.,
Treasurer,

Chesapeake & Delaware Canal Co.
Philadelphia.

[Endorsed: "1877 Geo Eyster Asst. Treas U. S."]

GOVERNMENT'S EXHIBIT NO. 14.

TREASURY DEPARTMENT.

November 27th 1877

Sir,

I have this day forwarded to the Assistant Treasurer of United States at Philadelphia a sight draft upon you to his order for fourteen thousand six hundred and twenty five dollars, being the cash dividend due the United States on the Stock of the Chesapeake & Delaware Canal as advised in your letter of the 8th inst.

Very Respectfully,
CHAS. W. HAYES,
Asst. Sec'y.

To

HENRY V. LESLEY, ESQ.,
Sec'y and Treas.

Chesapeake & Delaware Canal Co.
Philadelphia.

[Endorsed: "U. States Divd. Ex. 1877."]

GOVERNMENT'S EXHIBIT NO. 15.

This Exhibit is a slip of white paper $3\frac{1}{2}$ " x 8", bearing the following endorsement:

"(Div'd June 1871) No Voucher yet found."

GOVERNMENT'S EXHIBITS 16, 16-A, 16-B AND 16-C, "Osborn Photographs", not reproduced in record.

GOVERNMENT'S EXHIBIT NO. 17.

TREASURY DEPARTMENT.

May 10th 1869

Henry V. Lesley Esq.
Treasurer.

Chesapeake & Delaware Canal Co.
Philadelphia.

Pay to the Order of Geo. Eyster Esq. Asst. Treasurer at Philadelphia the sum of Sixteen Thousand, Eight hundred and seventy five dollars, being the amount of the cash dividend declared on the stock held and owned by the United States in the Chesapeake and Delaware Canal Company, and for which amount, the Secretary of the Treasury, is requested by letter of Henry V. Lesley, Esq., the Secretary and Treasurer of said Company, below.

Very Respectfully,
GEO. S. BOUTWELL,
Secretary of the Treasury.

\$16,875.00.

[Endorsed: "United States Dividend Geo Eyster, Asst. Treas. U. S. (Divd Decr 1868)."]

GOVERNMENT'S EXHIBIT NO. 18.

\$21937.50/100 No. . . Washington D. C. October 13 1870

(Revenue)
(Stamp)

At sight Pay to the

Order of Geo Eyster Ass't Treas' U S Phila Pa

Twenty-one thousand nine hundred thirty-seven 50/100
Dollars

Value received and charge the same to account of

To H V Lesley Treasurer
Chesapeake & Delaware Canal Co
417 Walnut St. Philadelphia
Pa

GEO. S.
BOUTWELL,
*Secretary of
the Treasury.*

[Endorsed across face: "PAID."]

[Endorsed on back: "U. S. of America Oct. 1870 Geo
Eyster Asst Treas. U. S."]

GOVERNMENT'S EXHIBIT NO. 19.

TREASURY DEPARTMENT.

\$16875.00/100.

April 26th, 1870.

At sight please pay to the order of George Eyster,
Assistant Treasurer the sum of Sixteen thousand
eight hundred and seventy-five Dollars, being the
amount of cash dividend declared in favor of the
United States, on the stock held in the Chesapeake
and Delaware Canal Company.

And oblige

To Henry V. Lesley, Esq.,
Secretary, Chesapeake and
Delaware Canal Company
Philadelphia Pa.

Very respectfully,
GEO. S. BOUTWELL,
Secretary.

[Endorsed: "United States of Am. Apl. 1870 Geo.
Eyster Asst. Treas. U. S. (Divd Decr 1869)."]

GOVERNMENT'S EXHIBIT NO. 20.

TREASURY DEPARTMENT.

Oct. 6th 1869.

Henry V. Lesley Esq.

Treasurer.

Chesapeake & Delaware Canal Co.

Philadelphia.

Sir,

Pay to the order of Geo. Eyster, Esq. Assistant Treasurer at Philadelphia, the sum of Sixteen Thousand, Eight Hundred and Seventy-five Dollars, being the amount of the cash dividend declared on the stock held and owned by the United States in the Chesapeake and Delaware Canal Company, and for which amount the Secretary of the Treasury is requested by letter of Henry V. Lesley, Esq. the Secretary and Treasurer of said Company, to draw.

Very Respectfully,

GEO. S. BOUTWELL,

Secretary of the Treasury.

[Endorsed: "United States Divd Geo Eyster, Asst. Treas. U. S. (Divd June 1869)."]

GOVERNMENT'S EXHIBIT NO. 21.

\$21,937 50/100 No. . . Washington D. C. April 24 1871

(Revenue)
(Stamp)

_____ At sight _____ Pay to the

Order of George Eyster Ass't Treasurer U S Phila
Twenty-one thousand nine hundred thirty-seven 50/100
Dollars

Value received and charge the same to account of

To Henry V Lesley, Treasurer
Chesapeake & Delaware Canal Co
417 Walnut Street
Philadelphia Pa

GEO. S.
BOUTWELL,
*Secretary of
the Treasury.*

[Endorsed: "U. S. America Divd 1871 Dec. 15/70 Geo Eyster Asst Treas. U. S."]

GOVERNMENT'S EXHIBIT NO. 22.

\$21.937 50/100 No. . . Washington D. C. April 30th 1872

(Revenue)
(Stamp)

At sight Pay to the

Order of George Eyster Ass't Treasurer U S Phila-
delphia

Twenty-one thousand nine hundred and thirty-seven
50/100 Dollars

Value received and charge the same to account of

To Henry V Lesley Esqr Treasurer Chesapeake & Delaware Canal Co 417 Walnut Street, Philadelphia	}	Wm. A. RICHARDSON, <i>Acting Secretary of the Treasury.</i>
---	---	---

[Endorsed across face: "PAID".]

[Endorsed on back: "U. States of Am 1872 Geo Eyster
Asst. Treas. U. S." (Divd Dec. 1871.)]

GOVERNMENT'S EXHIBIT NO. 23.

All Official Letters to the Department proper must be addressed to
the "Secretary of the Treasury," and in replying to Letters
from the Department the initials on the upper left
hand corner should be referred to.

D.B TREASURY DEPARTMENT,

Washington, D. C., May 8th, 1873.

Sir:

Please pay to George Eyster, Asst. Treasurer
U. S. at Philadelphia Pa. Twenty one thousand nine
hundred and thirty seven & 50/100 dollars due the U.

S. as a cash dividend collected by you from the Chesapeake & Delaware Canal Co. on stock held by the U. S.

Very respectfully,

WM. A. RICHARDSON,
Secretary.

H. V. Lesley, Treas.
Chesapeake & Delaware Canal Co.
528 Walnut St.
Philada.

[Endorsed: "U. S. of America 1873 Geo Eyster Asst
Treas. U. S. (Divd Dec 1872)."]

GOVERNMENT'S EXHIBIT NO. 24.

No. 7969. Office of the Assistant Treasurer of the U. S.

Philadelphia, May 11 1869

I Certify, That Hon. Geo. S. Boutwell Secretary of Treasury has this day deposited to the credit of the Treasurer of the U. S., Sixteen thousand, eight hundred & seventy five Dollars, on account of Cash dividend declared by Chesapeake & Delaware Canal Co. on Stock held by U. S. for which I have signed duplicate receipts.

\$16,875

GEO. EYSTER,
Assistant Treasurer U. S.

[Endorsed across face: "ORIGINAL. Transmit this Receipt in all cases to the Department at Washington."]

GOVERNMENT'S EXHIBIT NO. 25.

Office of the Assistant Treasurer of the U. S.
No. 2699.

Philadelphia, Oct 13 1869

I Certify, That Hon Geo S. Boutwell Secretary of the Treasury this day deposited to the credit of the Treasurer of the U. S., Sixteen thousand, eight hundred & seventy five Dollars, on account of dividend on Stock held by U. S. in Chesapeake & Delaware Canal Co. for which I have signed duplicate receipts.

\$16,875 #

GEO. EYSTER,
Assistant Treasurer U. S.

[Endorsed across face: "ORIGINAL. Transmit this Receipt in all cases to the Department at Washington."]

GOVERNMENT'S EXHIBIT NO. 26.

OFFICE OF THE U. S. ASSISTANT TREASURER.

P

No. 3780. DUPLICATE. Phila April 27th, 1870.

B.

I Certify, That Hon. Geo S. Boutwell Secretary of the Treasury this day Deposited to the Credit of the Treasurer of the United States, Sixteen thousand Eight hundred & Seventy five #/100 Dollars, on account of Dividend on Stock held by the United States in the Chesapeak & Delaware Canal Company, for which I have signed duplicate receipts.

\$16,875.
GEO. EYSTER,
Assistant Treasurer, U. S.

GOVERNMENT'S EXHIBIT NO. 27.

OFFICE OF THE U. S. ASSISTANT TREASURER.

No. 4427.

ORIGINAL.

Phil. Oct. 14, 1870.

C. F. K.

I Certify, That Hon. Geo. S. Boutwell, Secretary, U. S. Treas., this day Deposited to the Credit of the Treasurer of the United States, Twenty one thousand, nine hundred and thirty seven 50/100 Dollars, on account of Dividend on Stock held by the United States in the Chesapeake and Delaware Canal Company, for which I have signed duplicate receipts.

B

GEO. EYSTER.

\$21,937 50/100.

Assistant Treasurer, U. S.

GOVERNMENT'S EXHIBIT NO. 28.

OFFICE OF THE U. S. ASSISTANT TREASURER.

No. 5041.

ORIGINAL.

Phila. April 25th, 1871.

I Certify, That Hon. Geo. S. Boutwell, Secretary of the Treasury this day Deposited to the Credit of the Treasurer of the United States, Twenty one thousand nine hundred and thirty seven 50/100 Dollars, on account of Dividend on Stock held by the U. S. in the Chesapeake and Delaware Canal Co., for which I have signed duplicate receipts.

GEO. EYSTER,

\$21,937 50/100.

Assistant Treasurer, U. S.

GOVERNMENT'S EXHIBIT NO. 29.

OFFICE OF THE U. S. ASSISTANT TREASURER.

No. 6645. ORIGINAL. Phil. Oct. 27, 1871.

I Certify, That Hon. Geo. S. Boutwell Secretary of the Treasury, this day Deposited to the Credit of the Treasurer of the United States Twenty one thousand, nine hundred and thirty seven 50/100 Dollars, on account of dividend on stock held by the United States in the Chesapeake and Delaware Canal Company, for which I have signed duplicate receipts.

\$21,937 50/100. GEO. EYSTER,
Assistant Treasurer U. S.

GOVERNMENT'S EXHIBIT NO. 30.

OFFICE OF THE U. S. ASSISTANT TREASURER.

No. 7396. ORIGINAL. Phil. May 1, 1872.

I Certify, That Hon. Geo. S. Boutwell, Secretary of the Treasury, Washington D. C. this day Deposited to the Credit of the Treasurer of the United States, Twenty one thousand, nine hundred and thirty seven 50/100 Dollars, on account of Cash Dividend on Stock held by U. S. in the Chesapeake and Delaware Canal Company for which I have signed duplicate receipts.

\$21,937 50/100. P GEO. EYSTER,
Assistant Treasurer, U. S.

GOVERNMENT'S EXHIBIT NO. 31.

OFFICE OF THE U. S. ASSISTANT TREASURER.

No. 9648. ORIGINAL.

Phil. May 9, 1873.

I Certify, That Hon. Wm. A. Richardson Secretary of Treasury this day Deposited to the Credit of the Treasurer of the United States, Twenty one thousand, nine hundred and thirty seven 50/100 Dollars, on account of cash dividend on stock held by the U. S. in the Chesapeake & Delaware Canal Co., for which I have signed duplicate receipts.

\$21,937 50/100. P GEO. EYSTER,
Assistant Treasurer, U. S.

GOVERNMENT'S EXHIBIT NO. 64.

All Official Letters to the Department proper must be addressed to the "Secretary of the Treasury," and in replying to Letters from the Department the initials on the upper left hand corner should be referred to.

S

TREASURY DEPARTMENT,

GP
L

Washington, D. C., October 26, 1871.

Sir:

I enclose herewith for collection and deposit to the credit of the Treasurer of the United States on a/c of dividend on stock in the Chesapeake & Delaware Canal Co. owned by the United States, a sight draft on Henry V. Lesley Esq. Treasurer of said Company

for \$21,937.50. Please forward the entire set of certificates of deposit to this office.

Very Respectfully,
J. F. HARTLEY,
Actg. Secretary.

Geo. Eyster Esq.
U. S. Asst. Treasurer
Philadelphia Pa.

[Endorsed: "S-2562-Vol. 1-1871 Washington D. C. Oct. 26th 1871 Secretary of Treasury Hartley, J. F. Actg. Enclosed Dft. for \$21,937.50 on Ches. & Del. Canal Co. for certif of Deposit a/c Div. on Stock held by U. S. in said Co. Recd Oct. 27th 1871."']

GOVERNMENT'S EXHIBIT NO. 65.

Page from Letter-press Book endorsed "Press Copies of Letters. Miscellaneous. Sept. 1 to Oct. 31, 1871, inclusive. Loan Branch. Treasury Department."

(132)

S

GP
LC
Sir,—

October 26" 1

I inclose herewith for collection and deposit to the credit of the Treasurer of the United States on a/c of dividend on stock in the Chesapeake & Delaware Canal Co. owned by the United States,—sight draft on Henry V. Lesley Esq. Treasurer of said Company for \$21,937.50. Please forward the entire set of Certificates of deposit to this office.

Very Respectfully
J. F. HARTLEY,
Actg. Secretary.

Geo. Eyster Esq.
U. S. Asst. Treasurer
Philadelphia Pa.

GOVERNMENT'S EXHIBIT NO. 66.

CHESAPEAKE AND DELAWARE CANAL COMPANY.

Entries in Dividend Receipt Book of Defendant Company relating to dividends Nos. 15, 16 and 17.

No. of Order.	Stockholders.	Shares.	Dividend	When Received.	Receipt.
309	United States of America	14625	21937.50	Oct. 30/74	Wm. Y. Beale Per Order
262	United States of Am.	14625	14625	Nov. 19/75	Henry V. Lesley, Atty.
235	United States of A.	14625	14625	Dec. 5/77	Wm. Y. Beale Per Order

GOVERNMENT'S EXHIBIT NO. 67.

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
Walnut Street, Philadelphia.

October 9th 1867

Hon. Wm. E. Chandler

Ass. Sec. of Treasury.

Sir: There is now due a Cash Dividend of Sixteen Thousand eight Hundred and seventy five (\$16.875.=) Dollars on the Stock of this Company standing in name of the U. S. Government.

Before payment of the above \$16.875— the certificates of stock (both old and new issue) also the certificate of scrip, must be presented at this office that said certificates may be changed and be reissued in the New Stock under recent Acts of the States of Maryland and Delaware—said Law changes the par value of the stock from \$200— to \$50— each share—the following are the Certificates now in possession of the Government at Washington—viz.

No. 780—dated March 16, 1829—Old Stock—	750 @ \$200 per share
No. 785— “ March 21, 1829— “ “ —	1500 @ “ “ “
No. 2685— “ October 1, 1866—New Stock—	562 @ “ “ “
No. 212— “ October 1, 1866—Scrip	\$100.=

The foregoing reissued at \$50 per share will produce.....	11,248 shares
The Scrip Certificate as above “ “	2 “

11,250 “

You will oblige by having the certificates sent to this office that the new stock may be issued and the above Dividend paid—said Divd. being \$1.50 upon each of the 11,250 shares to be issued.

Very respectfully yours,

HENRY V. LESLEY,

Treas.

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
Walnut Street, Philadelphia.

April 30th 1868

Hon. Hugh McCulloch

Secy of Treasury Wash:—

Dear Sir. A Dividend of \$16,875= now stands upon the Books of this Company, subject to your order—it being a 3 per cent. dividend on 11,250 shares of Stock of this Co., and held by the U. S. Government.

This dividend was declared last December payable in cash, please draft at sight for the amount and oblige

Yours very respectfully,

HENRY V. LESLEY,
Treasurer.

[Endorsed: Ansd. May 2/68. Birchell. L. 150. Secretary's Office. May 2, 1868. Received.]

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
Walnut Street, Philadelphia.

October 14th 1868

Hon. Hugh McCulloch

Secy of the Treasury

Dear Sir—This Company has declared a Three per cent cash Dividend on its outstanding stock, \$1 50/100 per share. There now stands to the Or. of the U. States Government on 11,250 shares. \$16,875.= Subject to your order.

Respectfully yours,

HENRY V. LESLEY,
Secy.

[Endorsed: Ansd. Oct. 15/68. R. T. B. Secretary's Office, Oct. 15, 1868. Received.]

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
Walnut Street, Philadelphia.

May 6th 1869

Hon. Geo: Boutwell
Secretary of the Treasury
Washington, D. C.

Sir. This Company has declared a Dividend of \$1 50/100 per share on the outstanding stock of the Company. The U. S. Government owns 11,250 Shares.

Subject to your order at this time \$16,875.00—
for which please draw at sight and oblige

Yours respectfully,
HENRY V. LESLEY,
Treasr.

[Endorsed: Ansd. May 10 1869. R. T. B. C 534. Mr.
West. Secretary's Office, May 10, 1869. Re-
ceived.]

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
No. 417 Walnut Street, Philadelphia.

A. C. Gray, Prest.
H. V. Lesley, Secy.

October 5th 1869

Hon. Geo: Boutwell
Secy of the Treasury

Dear Sir. A cash dividend of \$1 50/100 per share
has been declared by this Company on the outstanding
Stock.

The U. S. Government holds of this Stock 11,250
shares—subject therefore to your order at this time
\$16,875.00—for which please draw at sight and oblige

Yours respectfully,
HENRY V. LESLEY,
Treasurer.

Ches. & Del. C. Co.

[Endorsed: Ansd. Oct 7, 1869. R. T. B. C. 25, Birch-
ett.]

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
417 Walnut Street, Philadelphia.

A. C. Gray, President.

H. V. Lesley, Secretary.

April 15th 1870

Hon. George Boutwell

Secy of the Treasury

Washington, D. C.

Sir. The proprietors of this Company have declared a Cash Dividend of \$1.50 per share on the outstanding Capital Stock of the Company—\$16,875 now stands to the Cr. of the Stock owned by the United States Government and subject to your order by draft at sight or otherwise—

There has also been declared a stock dividend of Thirty (30) per cent. on the present outstanding Capital Stock, which gives to the U. States Government on the shares of Stock so held (11,250 shares) Three Thousand Three hundred and seventy five shares, the par value of which being \$50.= per share—

This Stock dividend has been declared with the Shares of Stock created and issued, at par, from Cancelled Mortgage Loan of the Compy. purchased with the surplus revenue of the Company, under the provisions of the Mortgage. You will oblige by directing what disposition I shall make of stock so issued to the Cr. of the Government—

Respectfully yours,

HENRY V. LESLEY,

Secy.

[Endorsed: Ansd. April 26 1870. R. T. B. L. 332,
also C. Birchett. Secretary Treasury. Received
Apr. 18, 1870.]

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
417 Walnut Street, Philadelphia.

A. C. Gray, President.

H. V. Lesley, Secretary.

October 11th 1870

Hon. Geo: S. Boutwell

Secy of the Treasury

Washington, D. C.

Dear Sir

The proprietors of this Company have declared a Cash dividend on the outstanding Capital Stock of \$150/100 per shares—\$21,937.50 is the amount now standing on the Dividend Books to the Cr. of the United States of A. and subject to your order either by sight draft or otherwise.

Very respectfully,

HENRY V. LESLEY,

Treasurer.

[Endorsed: Draw sight draft on these people in favor of the Assistant Treasurer Phila for the amount S. C. 342. Bigelow. Secretary Treasury. Received Oct. 13, 1870.]

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
417 Walnut Street, Philadelphia.

April 20th 1871

Hon. Geo: S. Boutwell

Secy of the Treasury

Washington, D. C.

Dear Sir

The proprietors of this Company have declared a Cash Dividend on the outstanding Capital Stock of the Company, of \$150/100 per share, equal to 3 per cent.

The U. S. Government holds 14,625 shares—the Dividend amounting to Twenty one Thousand nine hundred and thirty seven 50/100 Dollars (\$21,937 50/100). This sum now subject to your order by sight draft or otherwise.

Respectfully yours,
HENRY V. LESLEY,
Treasurer.

[Endorsed: Draft at sight Sent April 24 1871 J. P. B.]

[Endorsed: 39038. Phila. Apl. 20, 1871. Chesapeake & Delaware Canal Co. Bigelow will please draw a draft in favor of A. T. Phila as usual. J. H. J. Declare a dividend of \$1.50 per share on outstanding capital stock. H. C. J. Chief Clerk. L. 437. Secretary Treasury. Received Apr. 22, 1871.]

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
417 Walnut Street, Philadelphia.

A. C. Gray, President.
H. V. Lesley, Secretary.

October 25th 1871

Hon Geo: S. Boutwell
Secy of Treasury
Washington, D. C.

Dear Sir

The proprietors of this Company have declared a Cash dividend on the outstanding Capital Stock of the Company, of \$1 50/100 per share. The amount due to the United States Government is Twenty one Thousand nine hundred and thirty seven 50/100 Dollars (\$21,937.50).

This sum is now subject to your order either by sight draft or otherwise.

Respectfully yours,
HENRY V. LESLEY,
Treas.

[Endorsed: Shall I order the above amount to be deposited at Philadelphia or what? Leipold.]

[Endorsed: 43562. Phila. Penna. Oct. 25, 1871. Chesapeake & Delaware Canal Company. State that a dividend has been declared, and amount due U. S. ready. Parnell file. C. 91. Sec'y's Office, Int. Rev. Div. Oct. 26, 1871. Received.]

OFFICE CHESAPEAKE & DELAWARE CANAL COMPANY,
Walnut Street, Philadelphia.

April 26th 1872

Hon. Geo: S. Boutwell
Secretary of the Treasury
Washington, D. C.

Dear Sir. The proprietors of this Company have declared a Cash dividend of \$1 50/100 per share on the outstanding Capital Stock. The amount due the U. States Government being Twenty one Thousand nine hundred and thirty seven 50/100 Dollars (\$21,937 50/100).

The above amount is now subject to your order, either by sight draft or otherwise.

Very respectfully yours,

HENRY V. LESLEY,
Treasurer.

[Endorsed: Philadelphia Apl 26 1872. Henry V. Lesley Tresr. Chesapeake & Delaware Canal Co. Informing Dept. that a dividend of \$21,937.50 is subject to order. C 1063. Loan. Secretary Treasury. Received Apr. 30, 1872.]

CHESAPEAKE & DELAWARE CANAL COMPANY,
Philadelphia, Penna.

Andrew C. Gray, Prest., New Castle, Del.

Henry V. Lesley, Secretary & Treas.

October 31st 1872

Hon. George S. Boutwell

Secy of Treasury

Sir

The proprietors of this Company have declared a Cash dividend on the Outstanding Capital Stock, of One and a half Dollars (\$1 50/100) per share.

The amount due to the U. S. Government being Twenty one Thousand nine hundred and thirty seven 50/100 Dollars. The am't due is now subject to your order, either by sight draft or otherwise.

Very respectfully yours,

HENRY V. LESLEY,

Treas.

[Endorsed: 49641. Philadelphia, Pa. Oct. 31st, 1872.
Henry V. Lesley, Tr. The proprietors of the above named Company, have declared a cash dividend of \$1.50 per share. Amt due Govt \$21,937.50. Subject to the Hon. Secretary's order. Loan. L 74. Secretary Treasury. Received Nov. 1, 1872.]

CHESAPEAKE & DELAWARE CANAL COMPANY,
Philadelphia, Penna.

Andrew C. Gray, Prest., New Castle, Del.

Henry V. Lesley, Secretary & Treas.

April 30th 1873

W. A. Richardson Esq.

Secretary of the Treasury

Washington, D. C.

Dear Sir

The proprietors of this Company have declared a Cash Dividend of \$1 50/100 per share on the outstanding Capital Stock. The amount due the U. S. Govern-

ment on its 14,625 shares being Twenty one Thousand nine hundred and thirty seven 50/100 Dollars (\$21,937.50).

The above is subject to your order, either by sight draft or otherwise.

Very respectfully yours,

HENRY V. LESLEY,

Treasurer.

C. & Del. Canal Co.

[Endorsed: 52356. 13914 A/1. Treasury Department. Received, May 6, 1873. Philada Apl 30, 1873. Chesapeake & Del Canal Co. \$21,937.50 due U. S. on a/c of dividend declared. C. 49. R. & I. Div. 1873. Treasury Dept. May 7, 1873. Respy referred to the Chief of the Loan Div. Chas. P. Conant, Chief of N't Div. Ansd. 5/8/73.]

GOVERNMENT'S EXHIBIT NO. 68.

Letter press copy of letter on page 226, of Letter press copy book, endorsed "K. Press Copies of Letters—Miscellaneous—Sept. 1, 1853, to Sept. 29, 1853, inclusive. Treasury Department."

TREASURY DEPARTMENT.

226.

Sept. 13, 1853.

Sir,

Please to pay to the order of Daniel Sturgeon, Esq., Treasurer of the Mint of the United States and depository, the sum of thirteen thousand five hundred Dollars (\$13,500) being the amount of the dividend upon the 2250 shares of the capital stock of your company, stated in your letter of the 12th inst. to be payable to the United States upon my draft.

JAMES GUTHRIE,

Secretary of the Treasury.

PETER LESLEY, ESQ.,

*Treasurer of the Chesapeake & Delaware
Canal Co., Philadelphia.*

GOVERNMENT'S EXHIBIT NO. 69.

Page from Letter-press Book, endorsed "GS. Press Copies of Letters. Governors and State Officers. July 1 to Dec. 31, 1866, inclusive. Treasury Department."

R.F.B.

224.

July 16, 1866

Sir:

I am directed by the Secretary to acknowledge the receipt of your letter of the 14th inst advising him that there is to the credit of the United States and subject to his order, the sum of thirteen thousand five hundred Dollars, the dividend declared by the Chesapeake & Delaware Company, on the 4th June last on 2250 shares of the Capital stock of said Company held by the United States, and to request that you will deposit the same with the Assistant Treasurer of the United States at Philadelphia, and transmit the certificate of deposit to this Department.

I am Very Respectfully,

WM. E. CHANDLER,

Assistant Secretary.

H. V. Lesley Esq.

Treas Ches & Del Canal Co.

417 Walnut Street

Philadelphia.

GOVERNMENT'S EXHIBIT NO. 70.

OFFICE OF THE ASSISTANT TREASURER OF THE U. S.
No. 3153. Philadelphia, July 18th 1866

I Certify, That Henry V. Lesley, Treas. Chesapeake & Del. Canal Co. has this day deposited to the credit of the Treasurer of the U. S., Fifteen thousand five hundred Dollars, on account of Dividend on 2250 Shares Capital Stock of above Co. as per letter of Secy. of Treasury dated July 16, 1866, for which I have signed duplicate receipts.

S. B. BROWN,

\$13,500# .

Assistant Treasurer U. S.

[Endorsed: Original. Transmit this Receipt in all cases to the Department at Washington.]

GOVERNMENT'S EXHIBIT NO. 71.

OFFICE OF THE U. S. ASSISTANT TREASURER.

No. 9050. ORIGINAL.

Phil. Nov. 2, 1872.

I Certify, That Hon. Geo. S. Boutwell Secretary of the Treasury this day Deposited to the Credit of the Treasurer of the United States, Twenty one thousand nine hundred and thirty seven 50/100 Dollars, on account of Dividend on Stock held by the United States in the Chesapeake and Delaware Canal Company for which I have signed duplicate receipts.

P
\$21,937 50/100. HAMET EARLE, JR.,
Actg. Assistant Treasurer, U. S.

GOVERNMENT'S EXHIBIT NO. 72.

OFFICE OF THE ASSISTANT TREASURER OF THE U. S.

No. 7182.

Philadelphia, Oct 17 1868

I Certify, That Hon. Hugh McCulloch Secy of Treasy has this day deposited to the credit of the Treasurer of the U. S., Sixteen thousand eight hundred & seventy five Dollars, on account of Cash dividend on Stock of the Chesapeake & Delaware Canal Co. held by the U. S. for which I have signed duplicate receipts.

\$16,875— C. McKIBBIN,
Assistant Treasurer U. S.

[Endorsed: Original. Transmit this Receipt in all cases to the Department at Washington.]

GOVERNMENT'S EXHIBIT NO. 73.

OFFICE OF THE ASSISTANT TREASURER OF THE U. S.

No. 6480.

Philadelphia, May 4 1868

I Certify, That Hon. Hugh McCulloch Secy. of the Treasury has this day deposited to the credit of the Treasurer of the U. S., Sixteen thousand eight hundred and seventy five Dollars, on account of Cash dividend declared on Stock held by the U. S. in the Chesapeake & Delaware Canal Co. in Dec. 1867 for which I have signed duplicate receipts.

C. McKIBBIN,

\$16875—

Assistant Treasurer U. S.

[Endorsed: Original. Transmit this Receipt in all cases to the Department at Washington.]

GOVERNMENT'S EXHIBIT NO. 74.

OFFICE OF THE ASSISTANT TREASURER OF THE U. S.

No. 5672.

Philadelphia, Nov 21 1867

I Certify, That Hon. Hugh McCulloch Secretary of the Treasury has this day deposited to the credit of the Treasurer of the U. S., Sixteen thousand eight hundred and seventy five Dollars, on account of Cash Dividend declared by the Chesapeake & Delaware Canal Co. on Stock held & owned by the United States in said Company for which I have signed duplicate receipts.

C. McKIBBIN,

\$16,875.

Assistant Treasurer U. S.

[Endorsed: Original. Transmit this Receipt in all cases to the Department at Washington.]

GOVERNMENT'S

HIBIT NO. 75.

Dr. THE TREASURER OF THE UNITED STATES in account current with
Gold and Silver Coin
and U. S. Notes

o. Eyster, Assistant Treasurer of the United States, at Philada. Cr.

Gold and Silver Coin
and U. S. Notes

Lawful Money of receivable for
the United States. Customs Duties.

No. of Draft	Warrant	Oct. 30, 1874.	Lawful Money of	receivable for
				the United States. Customs Duties.
To	Defaced & Old I. L. T. Notes, to Treas US #	446	59000.	
"	Redeemed Fund Currency " same	448	50000.	
"	Defaced Nat Bank Notes " same	447	100000.	
"	9769 IR 5293 Wm. J. Pollock, Coll. & D. A		1965.	
"	9835 " 5345 Wm. B. Elliot " " "		718.40	
"	" 36 " 46 Wm. J. Pollock " " "		450.49	
"	3162 I. 2014 John M. Dunn, USMar.		570.	
"	5856 C 3962 Wm. D. Nolen, Coll & D. Agt		75.	
Balance, forw'd			4187327.77	4620165.54
			4400106.66	4620165.54

	Oct. 30, 1874.	Lawful Money of	receivable for
			the United States. Customs Duties.
Bals from 29th inst		4223939.07	4606420.67
Intl Rev Tax from Edwd Riche, Coll 6th Pa.		1000.	
First Nat Bk Philada Pa. Trans Dept.		2698.30	
Corn Ex Do Do " Do		2321.25	
Farmers Do Lancaster " Do		10000.	
Certificates Deposit—Act June 8/72		120000.	
Transfer of Funds from Supt.			
US Mint Philada on T. #2451		40000.	
Seth I Comly, Coll'd Philada			
Hospital dues	\$60.19		
Storage Labor Sal.	18.95		
Official fees	68.90		
		148.04	
Same; A. Strong Rec Curr Coin			13744.87
		4400106.66	4620165.54

SAMUEL EARLEY, Act'g Asst. Treas.

rer at Philada. Oct. 30, 1874.)

(Endorsed: Transcript of Treasurer's Account. Office of U. S. Assistant T

GOVERNMENT'S EXHIBIT NO. 76.

Dr. THE TREASURER OF THE UNITED STATES in Account Current with George Eyster Assistant Treasurer of the United States at Philada. Pa. Cr.									
No. of	Kind of	No. of							
Draft.	Warrant.	Warrant.	December 5, 1877.	Lawful Money.	Coin.	Total.	Date, December 5, 1877.	Lawful Money.	Coin.
644	J.	2261	George C. Wilson	625.			By Balances from 4th instant	5799814.01	1759173.66
9137	C.	4304	A. P. Tuttow	1354.40		1979.40	" Int. Rev. Stamps Deposit % of list sent Sec.	1000.	
							" Certificates Act June 8, 1872	65000.	
			Silver paid in lieu of Currency withheld		1500.	1500.	" W. R. Bridgman U. S. N. Inspecr 4th Lt. Ho.		
			Transfer Funds				Dist. % Unexpended balance of Appropri.		
			Defaced U. S. Notes—Lot #1204	126000.		126000.	for support of Lt. Ho. Estab, fiscal year		
							ending June 30, 1877.		
			Balances forward	5755114.18	1761219.44	7516333.62	Supplies of Lt. Ho. 1877, 119.01 Salaries of		
							Keepers 1877, 261.87		
				5883093.58	1762719.44	7645813.02	Ex. Lt. Vessels 1877, 190.64 Ex. Buoyage		
							1877, 582.54 R 4/1889	1154.06	
							" Currency withheld in lieu of Silver paid	1500.	
							" A. P. Tuttow Coll. Port Philada. Pa.		
							% Tonnage dues	300.90	
							Hospital "	5.18	
							Storage fees	22.75	
							Inspection "	38.80	
							Official "	70.87	
								438.50	69092.56
							Do. % Customs Coin		3314.52
							" James Pollock, Supt. U. S. Mint Phila. Pa.		
							Pasting Ref. & Bar. Charges	231.26	3545.78
							" Transfer Funds		
							" Corn Ex. Natl. Bk. Philada. Pa. C.D. #1357	3348.25	
							" First Natl. Bk. Do. " #1358	10838.76	14187.01
								5883093.58	1762719.44
								7645813.02	

GEO. EYSTER, Asst. Treas. U. S.

(Endorsed: Transcript of Treasurer's Account. Office Asst. Treas. U. S. at Philada. Pa. Dec. 5, 1877.)



74 H

To the Treasurer of Chesapeake & Delaware
Canal Co
He might pay to / Cash
Treasurer of the United States, I order, for the use
of the said States, Nineteen thousand, four
hundred dollars, or 19,000 \$ of dividends,
on stock held by the said

Quarter of 1853
MISCELLANEOUS.

And for so doing this shall be your WARRANT.

GIVEN under my hand and the Seal of the
Treasury, this thirtieth day of
September in the year
of our Lord one thousand eight hun-
dred and fifty three and of the
Independence the seventy &

James Guthrie
Secretary of the Treasury.

C. A. L. Recorded.

J. Biggs
Register.

W. H. R. R.
COMPTROLLER.

E. Whittington
Comptroller.

Deposit in office Oct 2 at Phila
Sept 14th / 53 - \$ 12,500
1711B

Prima, October 20, 1852

Sam. Catby
Tucson, A.S.

W 26

MISCELLANEOUS
No. 758

4th QUARTER OF 1866

Received Dec 31 1866
A. C. C. Treasurer

W 26

To. Henry V. Linsley - Treasurer of the
Chicago and Delaware Canal Company

At sight pay to the Treasurer of the United
States, or order, for the use of the said States.
Thirteen thousand two five hundred
Dollars - on account of dividend
on 2250 shares of the Capital Stock
of the Chicago and Delaware Canal
Company

And for so doing this shall be your WARRANT.

Given under my hand and the Seal of the
Treasury, this 31st day
of December, in the year of
our Lord one thousand eight hundred
and sixty six and of Independence
the ninety-first.

Wm. C. C. Secretary of the Treasury.

W 26
\$13,500 -

W 26
Dec 31 1866
C. C. C.

W 26
RECORDED - 2

W 26
C. C. C.
Auditor, Register.

W 26
C. C. C.
C. C. C.

Deposited with the Asst. Treasurer of the U. S. at Philadelphia
July 18th 1866.

W 26

MISCELLANEOUS.

No. 693

4th QUARTER OF 1867.

RECEIVED Jan 4. 1868.
A. S. Johnson
Treasurer of the United States

R. J. B.

To *J. B. Spinnell*.

Treasurer United States

He might pay to the Treasurer of the United States, or order, for the use of the said States, Sixteen thousand, eight hundred and seventy five — Dollars and — Cents, on account of being amount of dividends due on stock of the Chesapeake and Delaware Canal Company held by the United States

And for so doing this shall be your WARRANT.

Given under my hand and the seal of the Treasury, this *thirtieth* day of *December*, in the year of our Lord one thousand eight hundred and sixty seven, and of Independence the ninety second

O. S. Harney

Assistant Secretary of the Treasury.

W. W. W.
\$16,875

J. B. Spinnell Jan 3 '68.
Comptroller

RECORDED
Jan 4 '68

M. B. Jones
actg. Secy.

R. J. B.
Comptroller

Expended with the Assistant Treasurer of the United States at Philadelphia
November 21st, 1867

W. W.

MISCELLANEOUS.
No. 638

25 QUARTER OF 1868.

To *F. C. Spinner*
Treasurer United States *for*

At sight pay to the Treasurer of the United States, or order, for the use of said States,

Sixteen thousand, eight hundred and
seventy-five dollars and ——— cents,
on account of dividend due the United States
on stock in the Chesapeake and
Delaware Canal Company

Received June 29, 1868
Wm. A. R. [Signature]
for Treasurer of the United States
to [Signature]

And for so doing this shall be your WARRANT.

Given under my hand and the seal of the Treasury, this *twenty-fourth* day of *June*, in the year of our Lord one thousand eight hundred and *sixty-eight*, and of Independence the *ninety-second*,

[Signature]

Assistant Secretary of the Treasury

[Signature]
Comptroller

[Signature]
\$16,875

[Signature] Recorder *27*

[Signature]
Register

[Signature]
Comptroller

Deposited with the Assistant Treasurer of the United States at *Philadelphia*
May 4 1868. \$

[Signature]

MISCELLANEOUS

No. 4605

4th QUARTER OF 1868.

United States 16-100
J. E. Spinner
Treasurer of the United States
J. E. Spinner

To J. E. Spinner
Treasurer United States ^{Jan}

At sight pay to the Treasurer of the United States, or order, for the use of said States,
Sixteen thousand, eight hundred
Twenty five dollars and _____ cents,
on account of dividends due the United States from the Chesapeake and Delaware Canal Company

And for so doing this shall be your WARRANT.

Given under my hand and the seal of the Treasury, this eight day
of December in the year of
our Lord one thousand eight hundred
and sixty eight and of Independence
the ninety third

[Signature]
\$16,875.

[Signature]
COCKRENE
11/2

[Signature]
Assistant Secretary of the Treasury.

[Signature]

RECORDED 44

[Signature]
Register.

[Signature]
Comptroller

Deposited with the Assistant Treasurer of the United States at Philadelphia
October 17, 1868. \$ *[Signature]*

✓
 MISCELLANEOUS
 No. 593.
 3^d Quarter of 1869.

To J E Spinner. RHS
 Treasurer, U.S.

At sight pay to the Treasurer of the United States, or order, for the use of said States

Sixteen thousand, eight hundred & seventy five ¹⁰⁰ dollars.
 on account of a dividend due the U.S. on
 Stocks of the Chesapeake & Delaware Canal
 Company, held by them.

Received July 28th 1869
 J. E. Spinner
 Treasurer of the United States
 [Signature]

And for so doing this shall be your WARRANT.

Given under my hand, and the seal
 of the Treasury, this 30th
 day of June, in
 the year of our Lord one
 thousand eight hundred and
 sixty nine, and of
 Independence the ninety-fourth.

[Signature]
 \$16,875.

[Signature]
 JULY 23,
 1869.

[Signature]
 Assistant Secretary of the Treasury.

[Signature]
 Register.

[Signature]
 Register.

[Signature]

Deposited with the Assistant Treasurer of the United States at Philadelphia
 May 11th 1869. \$

MINCELY, WOOD, &
No 381.
4th Quarter of 1869

To Secretary of the Treasury,

He might pay to the Treasurer of the United States or order, for the use of said States

Sixteen thousand, eight hundred ~~seventy~~ ^{five} dollars, on account of a dividend on Stocks of the Chesapeake and Delaware Canal Company held by the United States.

Received of J. C. T. 1869
J. C. T.
Treasurer of the United States.

And for so doing this shall be your WARRANT.

Given under my hand, and the seal of the Treasury, this 3rd day of December, in the year of our Lord one thousand eight hundred and sixty. From Independence the ninety-fourth.

\$16,845.

J. C. T.

O. J. Fuller
Assistant Secretary of the Treasury.

Mc

Recorder, C. W. Wilson
Register.

Comptroller.

Deposited with the Assistant Treasurer of the United States at Philadelphia, Pa
October 13, 1869. \$

Y. M.



TREASURY DEPARTMENT.

*To Hon. Mr. S. Boutwell
Secretary of the Treasury*

Pay to the **TREASURER OF THE UNITED STATES**, or order, out of the moneys received by you arising from miscellaneous sources, in pursuance of law.

Eight thousand eight hundred & seventy-five dollars on account of a dividend on Stocks of the Delaware & Chesapeake Canal Co. held by the United States.

REVENUE COVERING
WARRANT

No. 292

NOVEMBER 1870.

16.875. ✓

and for so doing this shall be your WARRANT

[illegible]

under my hand and the seal of the
Treasury Department, this 26th day
of May in the
year of our Lord one thousand eight
hundred and seventy, and of Inde-
pendence the ninety-fourth.

J. D. Hickey
Assistant Secretary.

475 25th
CONTINUED:

[illegible]

COUNTERSIGNED:


First Comptroller

REGISTERED:
113.2 *John Allen*
Register.

OFFICE OF THE
Treasurer of the United States.
Received *June 4*, 1870.

[Handwritten signature]

2/1/1



TREASURY DEPARTMENT.

S

To Hon. G. S. Foulwell,
Secretary of the Treasury

Pay to the **TREASURER OF THE UNITED STATES**, or order, out of the moneys received by you arising from miscellaneous sources, in pursuance of law

Twenty one thousand nine hundred
thirty-seven dollars & fifty cents on
account of a dividend on stock
of the Chesapeake & Delaware Can-
al Co. held in Trust by the United
States.

REVENUE COVERING
WARRANT.

No. 231

4th JANUARY 1870.

21.934.50

and for so doing this shall be your WARRANT.

DEPOSITED_____

With the Slavians Treasurer W. J. at

Philadelphia, Pa.
Oct. 14, 1890.

25 Feb 40

Given under my hand and the seal of the
Treasury Department, this 27th
of December, in the
year of our Lord one thousand eight
hundred and seventy, and of Inde-
pendence the ninety-fifth.

J. K. [Signature]
Assistant Secretary.

ONE 124

Courtesy of:

By: *W. Humphreys*

Acting First Comptroller.

Revised: 12/10

REGISTERED: 15.

 Registrar.

DEPOSITED—

With the *National Bank of*

DEPOSITED—

With the *National Bank of*

OFFICE OF THE

Treasurer of the United States.

Иванов *И. С.* 1870

[Handwritten signature]





REVENUE COVERING
WARRANT

No. 494

2nd QUARTER 1871.

TREASURY DEPARTMENT.

To Hon. Sec. S. Pottsville,
Secretary Treasury.

Pay to the TREASURER OF THE UNITED STATES, or order, out of the moneys received by you arising from miscellaneous sources, in pursuance of law, Twentyone thousand nine hundred thirty seven dollars & fifty cents on account of a dividend on stock of Delaware & Chesapeake Canal Co. Held by the U. S.

\$21,937.50 ✓

and for so doing this shall be your WARRANT.

DEPOSITED—

With the Assistant Treasurer U. S. at

Philadelphia, Pa.
Apr. 25, 1871.

GIVEN under my hand and the seal of the Treasury Department, this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-one, and of Independence the ninety-fifth.

J. F. Ramsey

Assistant Secretary.

RECEIVED

COUNTERSIGNED:

Wm. Humphreys Jones

Acting First Comptroller.

REGISTERED

Wm. Humphreys Jones
Asst. Register.

DEPOSITED—

With the

National Bank at

OFFICE OF THE

Treasurer of the United States.

RECEIVED June 10, 1871.

Wm. Humphreys Jones
Treasurer.



REVENUE COVERING
WARRANT

No. 366
11th QUARTER, 1871.

TREASURY DEPARTMENT.

To Hon. Sec. S. Boutwell,
Secretary of the Treasury

Pay to the TREASURER OF THE UNITED STATES, or order, out of the moneys
received by you arising from miscellaneous sources, in payment of law,

Twenty one thousand nine hundred
thirty seven dollars & fifty cents
on account of dividends on Dela-
ware & Chesapeake Canal Co. Stock
held by the U. S.

\$21,937.50

and for so doing this shall be your WARRANT.

DEPOSITED—	
With the Assistant Treasurer U. S. at	
Philadelphia, Pa.	
(Date 24, 1871)	

Given under my hand and the seal of the
Treasury Department, this 24th
of November, in the
year of our Lord one thousand eight
hundred and seventy-one, and of
Independence the ninety-sixth.

O. D. Manning
Assistant Secretary.

Comptroller:
A. H. H.
First Comptroller.

DEPOSITED—	
With the	National Bank at

Register:
J. B. Thompson
Register.

OFFICE OF THE
Treasurer of the United States.

Received Dec 15, 1871.



REVENUE COVERING
WARRANT.

No. 1297
2nd QUARTER, 1872.

TREASURY DEPARTMENT.

To Hon. G. S. Boutwell,
Secretary Treasury

Pay to the TREASURER OF THE UNITED STATES, or order, out of the moneys
received by you arising from miscellaneous sources, in pursuance of law,

Twenty-one thousand nine hundred
thirty seven dollars & fifty cents on
account of dividend on Delaware
& Chesapeake Canal Co. Stock held
by the U. S.

\$21,937.50

and for so doing this shall be your WARRANT.

DEPOSITED—	
With the Assistant Treasurer U. S. at Philadelphia, Pa. May 1, 1872	
Amount collected	

GIVEN under my hand and the seal of the
Treasury Department, this 29 day
of June, on the
year of our Lord one thousand eight
hundred and seventy-two, and of
Independence the ninety-first.

Wm. S. Paine
Acting Assistant Secretary
August 3, 1872

Aug 10th
ACB
Acting First Comptroller

DEPOSITED—	
National Bank at ✓	
Amount collected	

August 10th
Acting
August 10, 1872
August 10, 1872

OFFICE OF THE
Treasurer of the United States.

August 10, 1872
August 10, 1872

LIST OF DEPOSITS made with

at Philadelphia

George Taylor

, State of

Penn^a

, U. S. ASSISTANT TREASURER

, to the credit of the

TREASURER OF THE UNITED STATES, for receipts on account of

credited in Transcript No.

for the month ending May 31st, 1872.

DATE	No of G. R.	DEPOSITOR	AMOUNT
May 1		Am G. S. Kentwell, Secy of Treasury bank dividend on stock held by U. S. bks + Del bonds to etc 13 dividend on Delaware of Chesapeake Canal stock held since by U. S.	21,907.00



REVENUE COVERING WARRANT.

No. 864.

4th QUARTER, 1874

TREASURY DEPARTMENT.

To Hon. Gen. S. B. Boutwell

Secretary Treasury

Due to the TREASURER OF THE UNITED STATES, or order, out of the moneys

received by you arising from miscellaneous sources, in pursuance of law

Twenty-one thousand nine hundred

thirty-seven dollars & fifty cents on ac-

count of dividends on Delaware and

Chesapeake Canal Stock held by

the U. S.

\$31,907.50 ✓

and for so doing this shall be your WARRANT.

DEPOSITED—

With the Assistant Treasurer W. J. at

Philadelphia, Pa.

on 2d, 1874.

See per statement hereto attached

Given under my hand and the seal of the

Treasury Department, this 31st day

of December, in the

year of our Lord one thousand eight

hundred and seventy-four, and of

Independence the ninety-third

W. J. Boutwell
Assistant Secretary.

OCCUPANCY:

W. J. Boutwell
First Secretary
James M. Smith
Register.

DEPOSITED—

With the

Assistant Treasurer at

See per statement hereto attached

OFFICE OF THE

Treasurer of the United States.

RECEIVED

Jan 30, 1875

GOVERNMENT'S EXHIBIT NO. 92.

DECLARATION OF DIVIDENDS 1 TO 14 BY DEFENDANT
COMPANY.

Office of the Chesapeake and Delaware Canal Company,
Philadelphia, June 6th: 1853.

Monday morning

Pursuant to the Acts of Incorporation of the Chesapeake and Delaware Canal Company a general meeting of the Stockholders and Loanholders of the said Company was held at their office this sixth day of June 1853.—

Therefore, be it *Resolved that*, a dividend of three per cent on the Capital Stock of this Company be declared by this general meeting payable at the office of the Company on and after the first day of July next—

Office, Chesap: & Delaw: Canal Coy.

Philadelphia, June 4th 1866.

Pursuant to public notice given in the newspapers of the States of Delaware, Maryland and Pennsylvania for thirty days agreeably to the Acts of Incorporation of the Chesapeake and Delaware Canal Company, a general meeting of the Stockholders and Loanholders of said Company was held at their office this day—

On motion, the following Resolution was unanimously adopted—viz

Resolved that a Dividend of Three per cent in Cash on the Capital Stock of the Company as recommended by the Board of Directors be made (payable, free from Government Tax) on demand—

Office—Philadelphia—June 3, 1867

Pursuant to public Notice given in the newspapers of the States of Pennsylvania—Maryland and Delaware, for thirty days agreeably to the Acts of incorporation of the Chesapeake and Delaware Canal Company a general meeting of the Proprietors of said Company was held at their office this day—

On motion, it was

Resolved, that a Cash Dividend be declared on the Stock of the Company payable to the Stockholders, clear of taxes, on and after the 15th. inst.—of three per cent—
 —

Office, of the Ches: & Del: Canal Company.

Philadelphia—December 2. 1867

Monday morning

Pursuant to Charter and public notice given in each of the States of Pennsylvania—Maryland and Delaware, a General meeting of the Stockholders and Loanholders of the Chesapeake and Delaware Canal Company was held at their office this day—

On motion, it was

Resolved, that a Cash Dividend of three (3) per cent. on the Capital Stock of this Company, for the last six months, be declared and made payable on and after the 12th inst. clear of taxes—
 —

Office, Chesap: & Delaware Canal Company.

Philadelphia—June 1. 1868

Monday, 11 O Clock A. M.

Pursuant to public notice given in the newspapers in the States of Pennsylvania—Maryland—Delaware agreeably to the Charter, a General Meeting of the

Proprietors of the Chesapeake and Delaware Canal Company was held at their office in the City of Philadelphia, this day—
.

On motion, it was

Resolved, that a Cash Dividend of three per cent on the Capital Stock of the Company be declared, free of all taxes, and made payable on and after the 15th. inst—
—

Office, Chesap: and Delaw: Canal Compy.

Philada—December 7, 1868

Monday, 11 O Clock, A. M.

Pursuant to Charter and public notice given in the States of Pennsylvania—Maryland and Delaware a General meeting of the Proprietors of the Chesapeake and Delaware Canal Company was held at their office this day.
.

On motion, it was

Resolved, that a Cash Dividend of three per cent. on the Capital Stock of this Company, be declared and made payable on and after the fourteenth inst. clear of all tax.
—

Office, Philadelphia, June 7, 1869

Chesap: and Delaw: Canal Coy.

Pursuant to public notice given the newspapers of the States of Pennsylvania, Maryland and Delaware, for thirty days agreeably to Acts of Incorporation of the Chesapeake and Delaware Canal Company a general meeting of the Proprietors of said Company was held at their office this day—
.

On motion, it was

Resolved, that a Cash Dividend of three per cent be declared, on the outstanding Capital Stock of the Company, and made payable on and after the 9th. inst—

Office of the Chesap: & Delaw: Canal Company.

December 6th 1869.

Monday 11 O Clock, A. M.

Pursuant to Charter and public notice given in the States of Pennsylvania—Delaware and Maryland, a General Meeting of the Proprietors of the Chesapeake and Delaware Canal Company was held at their office this day.

.

On Motion, it was

Resolved, that a Dividend of three per cent in cash free from taxes be now declared on the Capital Stock as it now stands on the Books of the Company, payable on the 15th. inst—

Office of the Chesap: and Delaw: Canal Company
Philadelphia, June 6, 1870.

Monday morning—

Pursuant to the Acts of Incorporation of the Chesapeake and Delaware Canal Company, a General Meeting of the Proprietors was held at their office this day the 6th of June 1870—

.

On Motion, of Mr John R. Baker, it was

Resolved, that a Cash Dividend of three per cent on the outstanding Capital Stock of the Company be declared, free of all taxes, and payable to the Stockholders on and after the 13th of June 1870—

Office of the Ches: & Delaw: Canal Company.

Philada.—December 6, 1870—

Monday morning

Pursuant to Charter and Public notice given in the States of Pennsylvania—Maryland and Delaware, a General meeting of the Proprietors of the Chesapeake and Delaware Canal Company was held at their office this day.

.

On Motion, it was

Resolved, that a Dividend of three per cent. in cash, free from taxes, be now declared on the outstanding Capital Stock of the Company as it now stands on the Books, payable on the 15th. inst—

Office of the Chesap: and Delaw: Canal Company.

Philada. June 5, 1871—

Monday Morning

Pursuant to Charter and Acts of Incorporation of the Chesap: and Delaware Canal Company, a General Meeting of the Proprietors was held at their office this day—the 5th of June 1871—

.

On Motion, it was

Resolved, that a Cash Dividend of three per cent on the outstanding Stock of the Company be declared, free of all taxes, payable to the Stockholders on and after the 12th inst

Office Ches: & Del: Canal Company,

Philada.—December 4th, 1871.

Monday morning

Pursuant to Charter and public notice given in the States of Maryland, Delaware and Pennsylvania, a general meeting of the Proprietors of the Chesapeake and Delaware Canal Co. was held at their office this day.

.

On Motion, it was

Resolved, that a Cash Dividend of three per cent, free from taxes, be now declared on the outstanding Capital Stock of the Company as it now stands upon the Books, payable to the Stockholders on the 15th inst—

Office, Philadelphia—June 3d, 1872.

Pursuant to public notice given in the newspapers of the States of Pennsylvania—Delaware and Maryland for thirty day agreeably to the Acts of incorporation of the Chesapeake and Delaware Canal Company, a General Meeting of the Proprietors of said Company was held at their office this day.

.

On Motion, it was

Resolved, that a Cash Dividend of three per cent, be declared, on the outstanding Capital Stock of the Company, free of all taxes, and payable to the Stockholders on and after the 13th inst—

—

Office, Chesap: and Delaw: Canal Company—

Philadelphia, Decem: 2, 1872.

Monday morning

Pursuant to Charter and public notice given in the States of Pennsylvania, Delaware and Maryland,

a general meeting of the Proprietors of the Chesapeake and Delaware Canal Company at their office this day

.

On Motion, it was

Resolved, that a Cash Dividend be declared on the outstanding Capital Stock of the Company, as it now stands upon the Books, of three per cent, payable to the Stockholders on and after the 10th of December 1872—

GOVERNMENT'S EXHIBIT NO. 93.

Entries in Dividend Receipt Book of Defendant Company relating to dividends No. 1-14 inc.

No. of Order.	Stockholders.	Shares.	Dividends.	When Received.	Receipt
309	United States of America	2250	13500	Sept. 14/53	For Danl. Sturgeon Treas. of the Mint of U. States and deposi- tary Jacob Plucken. Henry V. Lesley Treas. & Atty. for U. S. See letter of Secy. of Treas. dated July 16, 1866.
262	United States of America	2250	13500	July 18/66	A. C. Michener Actg. Ast. Treas. U. S.
235	United States of America	11250	16875	Nov. 21, 1867	A. C. Michener Actg. Ast. Treas. U. S.
4	United States of America	11250	16875	May 4/68	A. C. Michener Actg. Ast. Treas. U. S.
	United States of America	11250	16875	October 17/68	Wm. C. Barns for C. McKibbin Asst. Treas. U. S.

United States of America	11250	16875	May 11, 1869	Wm. C. Barns for Asst. Treas. U. S.
United States of America	11250	16875	Octob. 13/69	Wm. C. Barns for Asst. Treas. U. S.
United States of America	11250	16875	April 27/70	Wm. C. Barns for Asst. Treas. U. S.
United States of America	14625	21937.50	Octr. 14th, 1870	Wm. C. Barns for U. S.
United States of America	14625	21937.50	April 25/71	Wm. C. Barns for U. S. of A.
United States of America	14625	21937.50	Oct. 27/71	Wm. C. Barns for Asst. T. U. S.
United States of America	14625	21937.50	May 19/72	Wm. C. Barns for U. S.
United States of America	14625	21937.50	Novr. 2/72	Wm. C. Barns for U. S. A.
United States of America	14625	21937.50	May 19/73	Wm. C. Barns for U. S.

PETITION FOR WRIT OF ERROR.
(Filed March 30, 1916.)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF DELAWARE.

<i>United States of America</i>	}	No. 1. March Term, 1912.
v.		
<i>Chesapeake and Delaware</i>		
<i>Canal Company.</i>		

The petition of Chesapeake and Delaware Canal Company, the defendant in the above entitled cause, respectfully shows:

That on the twenty-first day of January, A. D. 1916, a judgment for sixty-three thousand, nine hundred twenty-four dollars and sixty-six cents (\$63,924.66) was entered by the District Court of the United States for the District of Delaware in the above entitled case, whereby your petitioner is aggrieved, and your petitioner herewith files an assignment of errors, stating either separately or particularly, each error which your petitioner assigns in said judgment and in the record of the proceedings resulting therein.

Wherefore, in accordance with the statute in such case made and provided, your petitioner prays that a writ of error may be granted from said judgment to the United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray, etc.

CHESAPEAKE & DELAWARE
CANAL COMPANY,

By

(Sgd.) WARD, GRAY & NEARY,
Its Attorneys.

ORDER ALLOWING WRIT OF ERROR.

(Filed March 30, 1916.)

AND NOW, to wit, this thirtieth day of March, A. D. 1916, upon motion of WARD, GRAY & NEARY, ESQUIRES, Attorneys for said defendant, and upon filing the within petition for a Writ of Error and Assignment of Errors, it is

ORDERED by the Court that a Writ of Error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Third Circuit, the judgment heretofore entered in said cause, and that the amount of bond on said Writ of Error be and hereby is fixed at the sum of Five Hundred Dollars, to secure the costs upon said Writ of Error and in the United States Circuit Court of Appeals for the Third Circuit, and Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, is hereby approved as surety on said Bond.

(Sgd.) EDWARD G. BRADFORD, J.

ASSIGNMENTS OF ERROR.

(Filed March 30, 1916.)

And now comes CHESAPEAKE & DELAWARE CANAL COMPANY, the defendant below, plaintiff in error above named, by CHARLES BIDDLE, CHARLES J. BIDDLE and WARD, GRAY & NEARY, ESQUIRES, its Attorneys, and says that in the record, proceedings and judgment in the above stated cause, there is manifest error in the following, to wit:

1. That the learned Judge erred in entering the order upon April 18, 1913, sustaining the demurrer filed by the plaintiff to the plea of the statute of limitations filed by the defendant, which order was as follows:

"Upon motion of Mr. Nields, it is ordered by the Court that the demurrer of the plaintiff to the plea of the statute of limitations by the defendant above pleaded be, and the same hereby is, sustained, with leave to the said defendant to plead over within five days from the date hereof." (R., p. 22.)

2. That the learned Judge erred in overruling the objection to the competency of the witness, Henry C. Pearson, as follows (R., pp. 206-207):

"MR. C. BIDDLE: I object to this witness testifying to the contents of that book, in any way. It was not kept by him, and he had nothing whatever to do with it; therefore, he is not competent to testify as to what that book contains, or does not contain.

THE COURT: The Court is only prepared to rule to this extent at the present time: If this witness swears that that book is an official book of the United States, kept by the public authorities pursuant to law, then he can state, if he is able, that he has examined that book, and that he finds, or does not find, certain things. The Court will allow that to be done.

(Exception noted for defendant.)"

3. That the learned Judge erred in ruling as follows (R., p. 208):

"THE COURT: It is not necessary to repeat it, but the Court makes this statement in order that the counsel might understand what the attitude of the Court is in regard to that matter. That if the witness shows that they are books, officially kept, in a public department of the Government, by proper officials, then the Court will allow the witness, if he has examined those books, to say whether he has or has not found certain things, provided those things seem to the Court to have a material bearing upon the merits of this case."

4. That the learned Judge erred in overruling the objection of the defendant, as follows (R., pp. 214-215):

“By THE COURT:

Q. Have you, or not, knowledge as to whether the book just referred to is a public record of the United States?

A. I have a knowledge, Judge, because I was in the office of the Register of the Treasury and assisted the clerk who compiled this book by comparing with him as to the aggregate and the individual amount of receipts.

Q. You say you assisted the clerk in compiling a book. I want to know whether you assisted the clerk in compiling this book?

A. Yes, sir; I did, in that way.

MR. C. BIDDLE: I object. The witness has produced a printed copy of a book which is called ‘Combined Statement of the Receipts and Disbursements, Apparent and Actual, of the United States, for the fiscal year ending June thirtieth, 1872,’ and on the outside of the book the dates are ‘1872 to 1880.’ He has testified that he assisted a clerk in combining these records, which consisted of records for the different years. I see here from 1872 to 1880, in different batches, and bound together, but different years. This book is being offered and the testimony of this witness is being produced for the purpose, not of proving entries in this book, but for the purpose of proving that entries are not in this book. This book cannot be offered in evidence for that purpose. First of all, this witness is not competent to testify, merely because he assisted some clerk in bringing this printed statement together. That does not make him competent to testify to these various entries, when they were made or how they were made. He has had no part whatever in making the entries there printed in this book. He has brought them together, and assisted a clerk in combining. He is, therefore, incompetent to testify as to the contents of that book, and the book

is offered for an improper purpose, namely, to prove not records that are in the book, but records that are not in the book.

THE COURT: Precisely; and the Court thinks it is admissible for that purpose. You offer it for the purpose of showing what?

MR. NIELDS: The non-receipt of money sued for in this case.

THE COURT: That entries, which should properly have been made in that book, if the dividends had been paid, were not entered in that book?

MR. NIELDS: Exactly.

THE COURT: The Court rules that that is a proper offer of testimony.

MR. C. BIDDLE: My grounds of objection are the incompetency of the witness and the improper purpose for which the book is offered, therefore, they are irrelevant and improper and should not be admitted.

(Exception noted for defendant.)"

5. That the learned Judge erred in admitting the following question and answer (R., p. 216):

"Q. Have you made an examination of that book with reference to any entry as to a receipt, by the United States, of any dividend from the Chesapeake and Delaware Canal Company?

A. I have.

Q. As a result of that investigation will you state to this Court and jury whether or no there is any entry in that official document showing the receipt by the United States of any payment on account of dividends of the Chesapeake and Delaware Canal Company paid to the United States?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.

(Exception noted for defendant.)"

6. That the learned Judge erred in admitting the following questions and answers (R., p. 217):

"Q. Is there, or not, any record of the receipt of any sum of money on account of dividends from

the Chesapeake and Delaware Canal Company in that book?

MR. C. BIDDLE: I object, as being leading.

THE COURT: The objection is sustained.

Q. What entries, if any, are there in that book with reference to the receipt of moneys from the defendant in this case?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.

(Exception noted for defendant.)"

7. That the learned Judge erred in admitting the following books and papers in evidence set out on Record, pages 236-237:

"At this time I simply tender in evidence the receipts and disbursements of the United States, beginning with the year from 1872 to 1880, inclusive, 1881 to 1888, inclusive, 1889 to 1895, inclusive, 1896 to 1900, inclusive, 1901 to 1906, inclusive, 1907 to 1911, inclusive, and the years 1912, 1913 and 1914, they having all been marked for identification.

THE COURT: Are they not all included in A-1 to A-14 inclusive?

MR. NIELDS: No, sir. Eight volumes comprehend this list.

THE COURT: Then your offer is this, and this is what is being discussed:

'I now offer these books in evidence, being the books which have been marked from A-1 to A-14, inclusive'?

MR. NIELDS: Yes, sir. In conformity with the suggestion of the Court I shall have to modify that tender, and confine the tender to this series of books about which I have been speaking. They are marked respectively A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8 and A-9, being from A-1 to A-9, both inclusive.

MR. BIDDLE: As this is a new offer I want to renew my objection which I have stated to the larger offer.

THE COURT: The greater includes the less."

8. That the learned Judge erred in making the following ruling (R., p. 240):

“These Governmental books are not to be treated as books of account—unlike a charge that deals with goods sold and delivered—they are altogether on a different plane. They are kept by officers, and sworn officers, and employees, whose sworn duty it is to faithfully discharge their duty; and the cases are absolutely unlike the case of private individuals and the case of the public books of the United States. . . .”

9. That the learned Judge erred in making the following ruling (R., p. 242):

“. . . The attorney for the United States should be permitted to show before this jury, if he can, that nowhere is there any—nowhere in any books of the Government—entry showing the receipt of these dividends. I do not know whether he can do it, or not, and whether that proposition includes more than he may be able to do. But now here, these books have been stated, by witnesses, as being the proper place in which to find certain entries if certain receipts had been had. Suppose it does not appear? Suppose it does not appear in the other books, which could be testified to? As I say, suppose it does not appear at all? That is a matter, it seems to the Court, which it is important the jury should take into consideration, not as conclusive, but taking it as sensible, reasonable men in the course of human probabilities. They are entitled to draw their inference.”

10. That the learned Judge erred in admitting the books in evidence set out in the following exhibits (R., p. 244):

“(The books admitted in evidence, subject to objection, are marked respectively, ‘Government’s Exhibit No. 78,’ ‘Government’s Exhibit No. 79,’ ‘Government’s Exhibit No. 80,’ ‘Govern-

ment's Exhibit No. 81,' 'Government's Exhibit No. 82,' 'Government's Exhibit No. 83,' 'Government's Exhibit No. 84,' 'Government's Exhibit No. 85,' and 'Government's Exhibit No. 86.')

11. That the learned Judge erred in making the following ruling on the evidence of Henry C. Pearson, and the exhibits therein referred to (R., p. 245):

"Q. Do you find a record of any payment made by the Chesapeake and Delaware Canal Company for any dividend declared by it to the United States after June 1st, 1873?

MR. C. BIDDLE: I object to the question as being incompetent and improper.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

MR. C. BIDDLE: It is understood between counsel that all of this witness' testimony is taken subject to the objection of defendant's counsel that it is irrelevant, incompetent hearsay and inadmissible.

Q. From the examination you have made of Government's Exhibit Nos. 78 to 86, inclusive, did you find any entry of a sum of money paid to the United States by the Chesapeake and Delaware Canal Company, or the Delaware and Chesapeake Canal Company, during the period covered by these exhibits?

A. I did.

Q. From the examination that you made of Government's Exhibits Nos. 78 to 86, both inclusive, did you find any record of the receipt of any payment to the United States after June 1st, 1873, by the Chesapeake and Delaware Canal Company, or the Delaware and Chesapeake Canal Company?

A. I did not."

12. That the learned Judge erred in admitting the following book in evidence (R., pp. 247-248):

"Q. Will you state to the Court and jury what this book is?

A. That is a combination of all the receipts of the Government, and from various sources, by fiscal years, from 1789, the formation of the Government, up to 1905 or 1906, and in one case 1913.

Q. Where is this book kept?

A. It is kept with the others, right in my charge.

Q. In the Treasury Department of the United States?

A. In the Treasury Department of the United States, yes, sir.

MR. NIELDS: I ask that this be marked for identification.

(Book, marked for identification, 'Government's Exhibit No. 14-A,' as of this date.)
I now offer that in evidence.

THE COURT: For what purpose?

MR. NIELDS: For the purpose of showing non-receipt, by the United States, of any sum of money after June 1st, 1873, on account of dividends from this defendant.

THE COURT: During the period covered by the book?

MR. NIELDS: Yes, sir.

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.
(Exception noted for defendant.)

(Book admitted in evidence, subject to the objection, and marked 'Government's Exhibit No. 91.')

13. That the learned Judge erred in refusing the motion to strike out as follows (R., pp. 261-262):

"MR. GRAY: I want to move to strike out Government's Exhibits Nos. 11, 12, 13, 14, 16, 16-A, 16-B, 16-C and 66."

.

(Mr. Gray here presents further argument in support of his motion to strike out.)

That being so, these exhibits here are exhibited by the Government, and not by us, and they

are immaterial. I therefore, ask that they be stricken out.

THE COURT: The Court declines to grant the motion.

(Exception noted for defendant.)"

14. That the learned Judge erred in charging the jury as follows (R., p. 267):

"This case turns upon the single question of payment or non-payment of the dividends by the Canal Company to the United States. It is the only disputed point for your consideration. If the dividends were paid by the Canal Company to the United States, as contended on behalf of the company, the United States has no claim to enforce in this action and your verdict should be for the defendant. On the other hand, if the Canal Company has failed to pay the dividends to the United States, as contended by the District Attorney, it is entitled to recover their amount in this action, and your verdict should be for the plaintiff.

(The defendant did then and there except to such charge. [R., p. 272.]")

15. That the learned Judge erred in charging the jury as follows (R., p. 268):

"It is settled law, affirmed and reaffirmed by the Supreme Court of the United States, and laid down and recognized in this case both by this Court and the Circuit Court of Appeals, that there is no statute of limitations applicable to this action as prosecuted by the United States."

(The defendant did then and there except to such charge. [R., p. 273.]")

16. That the learned Judge erred in charging the jury as follows (R., pp. 268-269):

"The defendant has adduced no evidence, but rests solely upon the disputable presumption of payment. This being a civil action and not a

criminal prosecution, the law does not require proof beyond a reasonable doubt, but only a preponderance of evidence to establish the non-payment of the dividends. Had the suit been brought within the twenty years, the defendant would have been required, in order to sustain a plea of payment, to produce only a preponderance of the evidence to support it; and as the result of the lapse of more than twenty years before the institution of suit is to impose upon the United States the burden of proving non-payment, equally that can be done by a preponderance of the evidence in the case, oral or documentary, direct and circumstantial.

(The defendant did then and there except to such charge. [R., p. 273.]”

17. That the learned Judge erred in charging the jury as follows (R., pp. 269-270):

“If the United States shows non-payment, it is sufficient. It is not necessary to show that the United States was hindered or prevented from suing earlier. Nor is it necessary to show that the officers of the United States were justified in waiting so long before bringing this suit or to explain just why suit was not brought earlier. The rule requiring proof beyond a reasonable doubt has no application to this case. Mere carelessness or negligence on the part of the officials of the United States in omitting earlier to institute proceedings for the collection of the dividends in question cannot, aside from the shifting of the burden of proof from the defendant to the United States as above mentioned, in any manner or to any extent constitute a defense to the claim made by the United States in this action, or injuriously affect the United States in its prosecution. Such is the settled law, and you are, therefore, instructed, if the United States has shown non-payment of the dividends, not to permit any idea or suggestion of mere laches, whether consisting of negligence or carelessness on the part of the officers or employees

or agents of the United States in not sooner causing this action to be instituted, or in not earlier ascertaining or discovering the fact that the dividends in question had been declared in favor of the United States, in any manner to influence your action as jurors in reaching a verdict in this case.

(The defendant did there and then except to such charge. [R., pp. 273-274.])"

18. That the learned Judge erred in charging the jury as follows (R., p. 271) :

"The Court has been requested to give you instructions on a number of points of law in the language employed by counsel. The charge of the Court embraces in substance all of the propositions suggested by counsel in so far as those propositions are, in the opinion of the Court, properly applicable to the case.

(The defendant did there and then except to such charge. [R., p. 275.])"

19. That the learned Judge erred in charging the jury as follows (R., p. 271) :

"There is a *prima facie* presumption that public officers duly perform their duty, and consequently in favor of the regularity of their official acts and records. And this presumption applies to the acts and records of the Treasury Department of the United States.

(The defendant did there and then except to such charge. [R., p. 275.])"

20. That the learned Judge erred in charging the jury as follows (R., pp. 271-272) :

"If on the evidence taken as a whole you find that the dividends in question have not been paid by the Canal Company to the United States, you will find a verdict for the plaintiff in a sum equal to the fifty-one thousand one hundred and eighty-seven dollars and fifty cents and interest thereon

at the rate of 6 per cent. from November 17th, 1911, until the day of the rendition of your verdict. If you do not so find, your verdict should be for the defendant.

(The defendant did there and then except to such charge. [R., p. 276.]”

21. That the learned Judge erred in his charge to the jury, inasmuch as the same was insufficient, inadequate and misleading.

(The defendant did there and then except to such charge. [R., p. 276.]”

22. That the learned Judge erred in declining to instruct the jury in the language of defendant's request, as follows (R., pp. 265-266):

“If you believe that by reason of the laches or carelessness of the employees of the Government the United States failed to take any action to recover these dividends during the twenty years prior to the beginning of this suit and has shown you no reason for this delay and the defendant has made no acknowledgment of the debt, the plaintiff is not entitled to recover in this case.

(The defendant did there and then except to such refusal. [R., p. 276.]”

23. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., pp. 265-266):

“If by reason of the laches of the employees of the Government, the Government has failed during the twenty years prior to the bringing of this suit to do that which the law says it must do to rebut the presumption of payment, your verdict must be for the defendant.

(The defendant did there and then except to such refusal. [R., p. 276.]”

24. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 266):

"The longer the Government has delayed in taking any steps to recover these dividends, the stronger is the presumption of payment, and where over thirty years have elapsed the evidence to rebut the presumption must be clear and convincing.

(The defendant did there and then except to such refusal. [R., p. 276.]")

25. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

"As the United States became a stockholder in the Chesapeake and Delaware Canal Company they are subject to all the rules and regulations governing other stockholders in that company.

(The defendant did there and then except to such refusal. [R., p. 276.]")

26. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

"The United States brings suit as a stockholder of the Chesapeake and Delaware Canal Company; it has, therefore, no higher rights of recovery against the corporation than has any other stockholder of that company.

(The defendant did there and then except to such refusal. [R., p. 276.]")

27. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

"The United States cannot disregard the duties and obligations which attach to the transaction of a business in which they have become engaged, and if they have been guilty of laches to the injury of the defendant they cannot recover.

(The defendant did there and then except to such refusal. [R., p. 276.]")

28. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

"When the United States becomes an actor in a court of justice, their rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and may by their conduct be estopped from recovering.

(The defendant did there and then except to such refusal. [R., p. 276.]")

29. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

"The Government is subjected to the same rules respecting the burden of proof, and quantity and character of evidence, the presumption of law and fact, that attend the prosecution of a like action by an individual.

(The defendant did there and then except to such refusal. [R., p. 276.]")

30. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264):

"The presumption of payment arising from the lapse of time is a presumption of fact and the evidence to overcome it must continue through the twenty years preceding the time when suit was brought.

(The defendant did there and then except to such refusal. [R., p. 276.]")

31. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264):

"When a presumption of payment has arisen by reason of the lapse of twenty years, it gathers strength by additional years and can only be rebutted by clear and undoubted evidence, and the

burden of producing this evidence is upon the plaintiff.

(The defendant did there and then except to such refusal. [R., p. 276.])"

32. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264) :

"If no proceedings have been instituted to secure payment of a claim for twenty years, time has written upon the face of the claim a receipt, which is made stronger if no recognition of the claim has been obtained for thirty-five years, as in the present case. The burden is upon the plaintiff to show that the receipt thus written on the claim is invalid, otherwise they cannot recover.

(The defendant did there and then except to such refusal. [R., p. 276.])"

33. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264) :

"The law presumes a payment after the lapse of twenty years and will not permit a recovery unless the evidence offered to prove that the claim is still unpaid is in the opinion of the Court sufficiently strong, if believed, to rebut the presumption of payment.

(The defendant did there and then except to such refusal. [R., p. 276.])"

34. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264) :

"The Government has long delayed asserting its rights as a stockholder of the defendant company without showing any sufficient reason or excuse for the delay; therefore they cannot recover interest in this case.

(The defendant did there and then except to such refusal. [R., p. 276.])"

35. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 265):

"The books of the Government are not evidence to show by the absence of entries thereon that these dividends were not received, nor can the presumption of payment be rebutted by evidence of a negative character; the books are only evidence in regard to affirmative or positive entries, either of debit or credit.

(The defendant did there and then except to such refusal. [R., p. 276.]")

36. That the learned Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 265):

"Under the law and the evidence in this case, the verdict of the jury must be for the defendant.

(Defendant did there and then except to such refusal. [R., p. 276.]")

WHEREFORE, the defendant below, plaintiff in error, prays that the judgment of the Court below may be reversed.

CHESAPEAKE & DELAWARE
CANAL COMPANY,

By

(Sgd.) CHARLES BIDDLE,

(Sgd.) CHARLES J. BIDDLE,

(Sgd.) A. C. GRAY,

Attorneys for Plaintiff in Error,

Defendant Below.

CITATION.

(Filed April 7, 1916.)

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
To the United States of America, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pennsylvania, on Saturday, the sixth day of May, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Delaware, wherein Chesapeake and Delaware Canal Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS my hand, at Wilmington, this seventh day of April, A. D. 1916.

(Sgd.) EDWARD G. BRADFORD,
*United States District Judge for the
District of Delaware.*

(Endorsed: Service of the within citation, with copy, accepted this seventh day of April, A. D. 1916. [Sgd.] Chas. F. Curley, United States Attorney, District of Delaware.)

PRAECIPE FOR MAKING UP TRANSCRIPT.

(Filed March 30, 1916.)

*To William G. Mahaffy, Esq.,
Clerk, U. S. District Court
for the District of Delaware.*

Please certify the following papers to constitute the Record to be transmitted to the United States Circuit Court of Appeals for the Third Circuit, in the matter of the Writ of Error in the above cause, viz.:

1. The Docket Entries.
2. The pleadings, including the opinion of the Court on the demurrer to the plea of the Statute of Limitations, and the Order entered thereon.
3. The verdict.
4. The judgment.
5. The Bill of Exceptions.
6. The Petition for Writ of Error, Order allowing the same, and the Assignments of Error.
7. The Citation.
8. This Praecepte.

(Sgd.) WARD, GRAY & NEARY,
Attorneys for Chesapeake and Delaware Canal Company, Defendant below, Plaintiff in Error.

March 30, 1916. I hereby acknowledge service upon me of a copy of the foregoing praecipe.

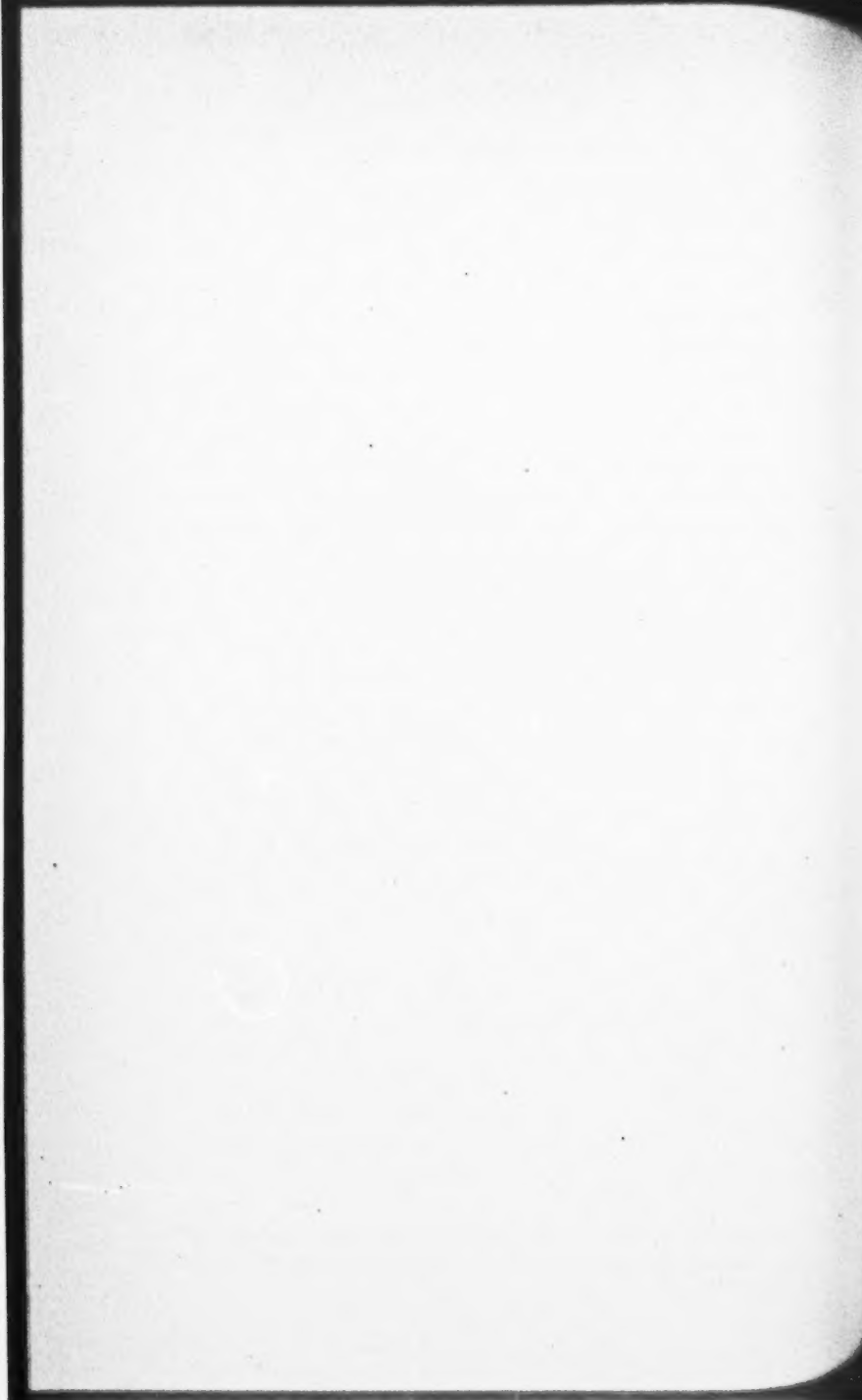
(Sgd.) CHAS. F. CURLEY,
U. S. Attorney, Attorney for Plaintiff.

CLERK'S CERTIFICATE.

I, WILLIAM G. MAHAFFY, Clerk of the District Court of the United States for the District of Delaware, do hereby certify that I have carefully compared the writings annexed to this certificate and they are true copies of their respective originals and are correct transcripts thereof, as the same now remain on file and of record in my office, being a complete exemplification of the record and proceedings in the case of The United States of America, plaintiff, against Chesapeake and Delaware Canal Company, defendant, No. 1 to the March Term, 1912, lately pending in said court, made up as provided in the praecipe of the attorney for the Chesapeake and Delaware Canal Company, defendant-plaintiff in error, filed in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Wilmington, in said district, this fourth
(Seal) day of May, in the year of our Lord, one thousand nine hundred and sixteen, and the Independence of the United States of America, the one hundred and fortieth.

(Sgd.) WM. G. MAHAFFY,
*Clerk U. S. District Court, District
of Delaware.*



IN THE
United States Circuit Court of Appeals,
FOR THE THIRD CIRCUIT.

October Term, 1916. No. 2118.

THE CHESAPEAKE AND DELAWARE CANAL
COMPANY,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

And afterwards, to wit, on the thirteenth day of November, 1916, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson, and Hon. Victor B. Woolley, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the thirty-first day of March, 1917, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

*Chesapeake and Delaware
Canal Company*

v.

United States,
Plaintiff below.

} October Term, 1916.
No. 2118.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

Before BUFFINGTON, McPHERSON and WOOLLEY, Circuit
Judges.

OPINION.

(Filed March 31, 1917.)

McPHERSON, *Circuit Judge.*

This suit was brought in March, 1912, to recover the amount of three dividends asserted by the Government to be still unpaid. Upon the first trial the Government proved its ownership of stock in the company, the declaration of dividends thereon in 1873, 1875 and 1876, and the fact that payment had been demanded in November, 1911—this in effect comprising all the evidence then offered. A verdict for the plaintiff was directed on the ground that the presumption of payment after twenty years should not be applied against the United States. The judgment was reversed (223 Fed. 926), this court holding that in such a suit the presumption did apply even against the sovereign; but, as the presumption was rebuttable, a new venire was awarded. On the second trial, the Government offered additional evidence to the following effect:

That fourteen dividends had been declared before 1873, and had been paid to the United States: that the company had given due notice of these dividends—the notices themselves and copies of the Government's replies being produced by the Treasury; and that no notices of the dividends in question were on file in the Department:

That, after the beginning of the suit, a Government agent had examined the company's books and papers, and had discovered on its files forged vouchers for these three dividends purporting to be signed by an officer of the United States; and had discovered also forged receipts therefor on the dividend-receipt books—these facts being explained by a witness, formerly in the company's service, who testified that he had been a party to these forgeries, and that he and the company's treasurer had embezzled a large sum of money during the years in question; that no notices of these dividends had been sent to the United States, and that no payment thereof had been made by the company before he left the company's service in 1886.

It was also testified by witnesses employed in the Treasury, that certain books (produced at the trial) were kept officially in the Department, and contained entries relating to public moneys during the period from 1872 to 1914; that in the usual course these books would, or at least should, contain entries relating to money paid into the Treasury from any source whatever, but that no entry of the dividends in question appeared therein. These books were nine in number (Exhibits 78 to 86), and were labeled "Receipts and Expenditures of the United States" for such and such a year. The volumes contain separate annual statements, printed by the Public Printer, each entitled "Combined Statement of the Receipts and Disbursements (Apparent and Actual) of the United States for the Fiscal Year ended June 30," &c.; and each is

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

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That, after the beginning of the suit, a Government agent had examined the company's books and papers, and had discovered on its files forged vouchers for these three dividends purporting to be signed by an officer of the United States; and had discovered also forged receipts therefor on the dividend-receipt books—these facts being explained by a witness, formerly in the company's service, who testified that he had been a party to these forgeries, and that he and the company's treasurer had embezzled a large sum of money during the years in question; that no notices of these dividends had been sent to the United States, and that no payment thereof had been made by the company before he left the company's service in 1886.

It was also testified by witnesses employed in the Treasury, that certain books (produced at the trial) were kept officially in the Department, and contained entries relating to public moneys during the period from 1872 to 1914; that in the usual course these books would, or at least should, contain entries relating to money paid into the Treasury from any source whatever, but that no entry of the dividends in question appeared therein. These books were nine in number (Exhibits 78 to 86), and were labeled "Receipts and Expenditures of the United States" for such and such a year. The volumes contain separate annual statements, printed by the Public Printer, each entitled "Combined Statement of the Receipts and Disbursements (Apparent and Actual) of the United States for the Fiscal Year ended June 30," &c.; and each is

preceded by a letter to the Secretary of the Treasury from the Chief of the Warrant Division, which declares that the statement contains:

“ . . . the receipts and disbursements of the Government by appropriations, exclusive of the principal of the public debt, for the fiscal year ended June 30, . . . exhibiting the various sources of the revenues, the apparent expense of each branch of the service under the several departments, and of each department on account of ‘Salaries,’ ‘Ordinary Expenses,’ ‘Public Works,’ ‘Miscellaneous,’ and ‘Unusual and Extraordinary’; and the actual expenses of the same and the *actual* revenues, by deduction from them of those items which appear in both accounts by requirements of law, but which are not *actual revenues* or *true expenditures*, and other items on account of branches of the service intended to be self-supporting, the expenses and revenues of which must by law enter to the account of the Treasury”——

these statements being officially forwarded by the Secretary to the Chairman of the Appropriations Committee of the House of Representatives.

Four other books were offered (Exhibits 87 to 90), each labeled:

“Register of Revenue Covering Warrants

“Miscellaneous

“Secretary of the Treasury

“Warrant Division”——

and these were identified as the original registers for 1872 to 1878, inclusive.

One other volume (Exhibit 91), labeled:

“Receipts of the United States

“1791—

“Register’s Office, Treasury Department”——

was identified as containing a record of all the Government’s miscellaneous receipts from 1791 to date,

this being the class of receipts in which dividends on stock owned by the United States would appear.

Of these fourteen volumes, Nos. 87-90 are originals, and the other ten are compilations of receipts and expenditures, but all of them are official books kept in the Department and purport to contain records of all the money from every source that had been covered into the Treasury. They contain entries of the fourteen dividends paid by the Canal Company before 1873, but contain no entry of the dividends in dispute.

The defendant offered no evidence, and the Court submitted the question whether on the plaintiff's showing the presumption of payment had been rebutted, and whether the company had in fact paid the sums sued for. The verdict was in favor of the Government, and the company assigns for error the admission of certain evidence, and the giving of certain instructions. The evidence complained of is the ten books already referred to, and in order to understand the situation clearly it will be desirable to state more fully the method by which the dividends in question should have reached the Treasury in the usual course of events.

Normally, this would have happened: After a dividend had been declared, a notice thereof would have been sent to the Treasury by the company, stating that the amount due was subject to the Government's order, either by draft, or otherwise. The Secretary would then have drawn at sight upon the company's treasurer, and the draft would have been sent for collection to the Assistant Treasurer of the United States in Philadelphia—the company probably being notified that the draft had been forwarded. Thereupon the draft would have been presented, and would have been paid either in cash or by check. The Assistant Treasurer would then have issued two certificates of deposit, specifying that he had received

this particular payment from the company, and would have transmitted these certificates to the Treasury, at the same time charging himself therewith in his own daily account of receipts. The other party to this account is the Treasurer of the United States, all public moneys being subject to his draft, and for this reason the dividend would have been deposited to the Treasurer's credit, and the Assistant Treasurer would have reported it to Washington as money received by him in account with the Treasurer. After the certificates of deposit and the Assistant Treasurer's daily transcript of account had reached Washington, they would have been examined and checked to see that they agreed, and the certificates would then have been made the basis of a deposit list, the list being prepared by the Division of Public Moneys and passed to the Division then known as the Division of Warrants, Estimates, and Appropriations—afterwards, the Division of Bookkeeping and Warrants. After this Division had received the list containing the items fully set out in the certificates, a warrant would have been prepared formally covering the money into the Treasury, thereby charging the Treasurer of the United States, and fixing his accountability therefor. This covering warrant would have been registered in the Division of Warrants, Estimates, and Appropriations, and would have been passed over to the Division of Public Moneys so that the number and date of the warrant might there be noted. Moreover, the covering warrant (signed by the Secretary of the Treasury) would have been passed to the Comptroller of the Treasury, who is required by law to keep a duplicate set of books in reference to these matters. The Comptroller would have countersigned the warrant, and passed it in turn to the Treasurer of the United States, who would have acknowledged thereon the receipt of the particular money described therein. At the end of the quarter

the Treasurer would have submitted to the Auditor of the Treasury an account of the moneys received by him during the quarter, and of his disbursements during the same period. These accounts of the Treasurer are in book form, and are examined and settled by the Auditor, who certifies the balance due by the Treasurer to the United States, charging him with the covering warrants issued by the Secretary of the Treasury, and crediting him with all payments made upon warrants drawn on him by the Secretary. The books of the Department show that drafts were drawn for thirteen of the fourteen dividends referred to and were paid to the Assistant Treasurer at Philadelphia, reaching the Treasury in the manner described. No draft was drawn for the fourteenth (the dividend of 1866), but this was deposited directly with the Assistant Treasurer in Philadelphia by the company's treasurer.

The course of accounting just described is commanded by the Federal statutes. Exhibit 91 was compiled from Exhibits 78 to 86, which (as already stated) are combined statements of receipts and disbursements by the Treasurer of the United States, made up in the Division of Bookkeeping and Warrants and sent to the Secretary of the Treasury. The fourteen dividends referred to were all paid in Philadelphia and were entered on the books of the Sub-Treasury in that city. The ten exhibits now under consideration are not books of original entry in the ordinary sense of that phrase; except in part, they had not been prepared by the witnesses that testified about them; and they were not certified as copies of original documents. It was further testified that all the exhibits had been thoroughly examined, but that no entry had been found therein of any of the dividends in question, although such dividends should have appeared if they had been paid.

This is the evidence that was offered to rebut the presumption of payment—the Government relying on the testimony of the company's guilty employee, on the absence of entries in the Treasury's books, and on the evidence concerning the earlier dividends.

(1) We shall not discuss at length the question whether the ten exhibits complained of were admissible evidence. They did not need to be certified; they were not copies, but were themselves the records kept in the Treasury, and their authenticity is not denied. In our opinion, they were competent evidence. We understand the general rule to be, that when a public officer is required either by statute or by the nature of his duty to keep records of transactions occurring in the course of his public service, the records thus made either by the officer himself or under his supervision are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and moreover are made in the discharge of a public duty and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are *prima facie* evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage. There are many decisions in which the general subject is discussed, and some of them may be found in the note to Section 332 on page 1125 of Volume 10, *Ruling Case Law*, and in the notes to paragraph 5 *a* on page

306 of 17 Cyc. See also *Evanston v. Gunn*, 99 U. S. 660; *White v. U. S.*, 164 U. S. 102; 5 *Chamberlayne*, Evid., Secs. 3424 *et seq.*; 3 *Wigmore*, Evid., Secs. 1630 *et seq.*; and 17 Cyc. 306, Sec. 5; *Bank v. Brown*, 53 L. R. A. 523, note.

And the reasons just stated make such official records competent evidence to prove also the absence of entries that in the usual course should appear therein: *U. S. v. Teschmaker*, 63 U. S. 405; *Amer. Surety Co. v. Pauly* (C. C. A.), 72 Fed. 470; 3 *Wig.*, Sec. 1633(6), p. 1982; 3 *Chamberlayne*, Sec. 1757.

(2) The more important question raised on this writ is, whether the Government's evidence was sufficient to rebut the presumption of payment arising from the lapse of time. In effect, the defendant contends that a verdict in its favor should have been directed, and it will be sufficient to consider the question from that point of view. What then was the Government's situation? For more than thirty years no demand had been made for the dividends in suit, and therefore the Government was met by the well-established rule that presumptively payment had been made, and was obliged to prove that this presumption, or inference of fact, was not true. In other words, the burden of proof had shifted, and the Government could no longer content itself with proving its right of action—that is, the mere declaration of a dividend—and with leaving the defendant to prove that payment had been made. The Government was now compelled to prove a negative—that is, that payment had *not* been made—its less favorable position being due to the well-settled and excellent rule of public policy that punishes a plaintiff for excessive delay in asserting his right.

But such a delay is not necessarily fatal; it only makes a plaintiff's task more difficult. If he can pro-

duce sufficient evidence of non-payment, he fulfils the requirements of the law, for this exactly meets the challenge of the presumption and overthrows it. We do not agree, that before the Government could be allowed to prove the fact of non-payment it was bound (as a separate obligation), to explain or excuse the delay. It is possible that the language used in some discussions of the subject will bear this construction, but even if this be true we do not find the point squarely decided, and in any event we are unable to see that the reason of the rule puts such an obligation on a delinquent creditor. And, even if we assume that a private suitor might be obliged to explain or excuse his prolonged failure to sue, this merely requires him to account for his laches or negligence, and, as the sovereign is not bound by the laches of his agents, he cannot be compelled to explain a neglect that he may wholly disregard. But in the case of a private suitor also we think the defendant's contention is not sound. Loose expressions may have been sometimes used on this subject, but if the presumption and the reasons of policy that sustain it be closely considered we think it will appear that after twenty years the issue between the parties continues to be what it was before, namely, Has the particular debt been paid? When the statute of limitations is interposed as a defense, the question of payment becomes of no importance; the plaintiff cannot recover, although it may be certain that he has not been paid; but where the statute does not apply (and it does not in the present case), the issue of payment is the vital matter. Ordinarily, a plaintiff need do no more than prove the existence of his claim, whereupon the defendant must prove payment. But, if it appears from the evidence that the debt is of long standing, the plaintiff's task becomes progressively difficult, for the inference of payment may then be readily drawn from other cir-

cumstances; and, if the delay has lasted for twenty years, a definite presumption arises that is often the practical equivalent of the statute. Legally, however, it is not the equivalent; if he can, the plaintiff may always prove that he has not been paid, but his delay has somewhat changed the character of his task, and forces him to show reasons why the failure to sue should not be a bar. These reasons may appear to be merely explanations or excuses, and may be so described without inaccuracy, but we think it equally accurate to say that they are really part of the evidence that tends by inference to show non-payment. For example; a dilatory plaintiff often proves the defendant's insolvency; this may be correctly spoken of as an excuse for delay, but just as truly it is a fact tending to show that the debtor has not paid because he could not pay. So, the absence of the debtor from the jurisdiction; this tends to show that he has not paid because he could not have been sued, and thus compelled to pay. So also, the near relationship between the parties; this tends to show non-payment because it furnishes a reason why the plaintiff did not ask for the debt, or did not urge its payment. As it seems to us, such matters as these become part of the plaintiff's task, but they are not conditions precedent to success. In the end, all he is bound to prove is non-payment, and in fulfilling that obligation explanations or excuses are merely steps in the proof.

The defendant cites the following cases in support of its contention: *Bowman v. Wathen*, 42 U. S. 189; *Wagner v. Baird*, 48 U. S. 233; *Phillippi v. Phillippe*, 115 U. S. 151; *Hillary v. Waller*, 12 Vesey, Jr., 239; *Colt v. Humphreys*, 14 Serg. & Rawle (Pa.) 15; *Foulk v. Brown*, 2 Watts (Pa.) 215; *Sellers v. Holman*, 20 Penna. 321; *Miller v. Overseers*, 17 Penna. Super. 159; *Holway v. Sanborn*, 145 Wis. 151; *Stover v. Duren*, 3 Strob. (S. C.) 448. Among these we quote

from *Sellers v. Holman* what is probably a typical statement of the rule:

“Those rules which give repose to society and forbid the assertion of stale claims, after the evidence of their discharge has been lost, are everywhere much more highly appreciated by the courts now than they were once. It has, however, not been decided in any case, ancient or modern, that a mere demand, without more is enough to repel the presumption, and in one, at least (1 Ves. & Be. 536), the contrary was held. . . .

“That a specialty or debt of record is paid after twenty years from the time it became due, is a presumption of law which the courts must enforce without inquiring whether it be according to the truth or not. The law has given to this lapse of time a fictitious value, equal to direct proof of payment. But the evidence of non-payment, by which the presumption is to be repelled, has no force, except what it derives from its intrinsic power to produce conviction on the mind. A circumstance, therefore, which does not actually disprove the payment, nor satisfactorily account for the delay, is entitled to no weight. The presumption of payment is raised by an artificial rule. It cannot be rebutted, except by evidence which will create a natural presumption, at least equally strong.”

In *Coleman v. Erie Trust Co.*, 255 Penna. 63, the most recent case decided by the same court, it is said:

“The presumption of payment arising from lapse of time is not conclusive, but is merely a presumption of fact which is rebuttable. ‘The presumption is rebutted, or, to speak more accurately, does not arise, when there is affirmative proof . . . that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor’; *Reed v. Reed*, 46 Pa. 239, 242. Further on in the same opinion Mr. Justice Strong said, that presumption from lapse of time ‘is only an inference that the debtor has done something to discharge the

debt, to wit, that he has made payment. Hence it is rebutted by simple proof that payment has not been made. And the facts being established, whether they are sufficient to rebut it, is a question for the court, and not for the jury.' In this instance there was affirmative proof that the judgment had not been paid, in the positive testimony of the plaintiff to that effect. The facts were not in dispute, and it was, therefore, for the court to say whether or not the judgment was a valid claim. In addition to the affirmative proof that the debt had not been paid, the circumstances shown were such as to reasonably account for the delay. It appeared that the debtor was for years in straitened financial circumstances, and had but a small income, which would have been seriously disturbed had payment of the judgment been pressed. The relationship of father and son between the defendant and plaintiff was also a sufficient and natural reason for the delay of the latter in enforcing payment."

The company concedes (as it must) that the presumption is rebuttable, and we do not see how it can be repelled except by such evidence as is no doubt sometimes called "explanations for delay." And in this connection we think it should be remembered that the rule grew up and took shape while parties themselves were not permitted to testify. Direct evidence, therefore, either of payment or of non-payment, was not easy to obtain, and the parties were driven to such indirect evidence as would support the inference of one fact or the other. Even now, when parties are in general competent witnesses, a living party, if his antagonist be dead, cannot testify to facts that occurred in the decedent's lifetime. So that the result is this: if both parties be alive, and if oath be opposed to oath, the case can hardly be decided except by the indirect evidence, whatever name this may bear; if only one party be living, the indirect evidence is usually all that can be offered.

Of course a mere demand by the creditor after twenty years adds no strength to his case, and the courts have not attempted to lay down with precision how much evidence is necessary before the question of payment should be submitted to a jury. In this respect every case must stand on its own footing, and concerning the present record we shall say nothing more except that a careful study has satisfied us, not only that the trial Judge could not properly have directed a verdict for the company, but also that the evidence carries clear conviction that the dividends in question have never been paid. That the money was stolen by the company's trusted servants, is its grievous misfortune, but this is undoubtedly the fact, and the loss must rest where it has fallen.

We see no need to discuss the assignments of error in detail; no reversible error was committed in the conduct of the trial, and the judgment must therefore be affirmed.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

<i>Chesapeake and Delaware</i>	}	October Term, 1916. No. 2118 (List No. 53).
<i>Canal Company,</i>		
Plaintiff in Error,		
v.		
<i>United States,</i>		
Defendant in Error.		

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

ORDER AFFIRMING JUDGMENT.
(Filed March 31, 1917.)

This cause came on to be heard on the transcript of record from the District Court of the United States,

for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

JOHN B. McPHERSON,
Circuit Judge.

Philadelphia, March 31, 1917.

IN THE SUPREME COURT OF THE UNITED STATES.

<i>Chesapeake and Delaware</i>	}	
<i>Canal Company,</i>		
Defendant below,		
Plaintiff in Error,		
v.	}	
<i>The United States of</i>		
<i>America,</i>		
Plaintiff below,		
Defendant in Error.		

Term.
No.

ASSIGNMENTS OF ERROR.
(Filed April 13, 1917.)

AND NOW comes the Chesapeake and Delaware Canal Company by their attorneys, Charles Biddle and John G. Johnson, and say that in the record of proceedings in the above-entitled action in the United States Circuit Court of Appeals for the Third Circuit, there is manifest error.

First.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 346):

2. That the learned trial Judge erred in overruling the objection to the competency of the witness, Henry C. Pearson, as follows (R., pp. 206-207):

“MR. C. BIDDLE: I object to this witness testifying to the contents of that book, in any way. It was not kept by him, and he had nothing whatever to do with it; therefore, he is not competent to testify as to what that book contains, or does not contain.

THE COURT: The Court is only prepared to rule to this extent at the present time: If this witness swears that that book is an official book of the United States, kept by the public authorities pursuant to law, then he can state, if he is able, that he has examined that book, and that he finds, or does not find, certain things. The Court will allow that to be done. (Exception noted for defendant.)”

Second.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 346):

3. That the learned trial Judge erred in ruling as follows (R., p. 208):

“THE COURT: It is not necessary to repeat it, but the Court makes this statement in order that the counsel might understand what the attitude of the Court is in regard to that matter. That if the witness shows that they are books, officially kept, in a public department of the Government, by proper officials, then the Court will allow the witness, if he has examined those books, to say whether he has or has not found certain things, provided those things seem to the Court to have a material bearing upon the merits of this case.”

Third.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 347):

4. That the learned trial Judge erred in overruling the objection of the defendant, as follows (R., pp. 214-215):

“By THE COURT:

Q. Have you, or not, knowledge as to whether the book just referred to is a public record of the United States?

A. I have a knowledge, Judge, because I was in the office of the Register of the Treasury and assisted the clerk who compiled this book by comparing with him as to the aggregate and the individual amount of receipts.

Q. You say you assisted the clerk in compiling a book. I want to know whether you assisted the clerk in compiling this book?

A. Yes, sir, I did, in that way.

MR. C. BIDDLE: I object. The witness has produced a printed copy of a book which is called ‘Combined Statement of the Receipts and Disbursements, Apparent and Actual, of the United States, for the fiscal year ending June thirtieth, 1872,’ and on the outside of the book the dates are ‘1872 to 1880.’ He has testified that he assisted a clerk in combining these records, which consisted of records for the different years. I see here from 1872 to 1880, in different batches, and bound together, but different years. This book is being offered and the testimony of this witness is being produced for the purpose, not of proving entries in this book, but for the purpose of proving that entries are not in this book. This book cannot be offered in evidence for that purpose. First of all, this witness is not competent to testify, merely because he assisted some clerk in bringing this printed statement together. That does not make him

competent to testify to these various entries, when they were made or how they were made. He has had no part whatever in making the entries there printed in this book. He has brought them together, and assisted a clerk in combining. He is, therefore, incompetent to testify as to the contents of that book, and the book is offered for an improper purpose, namely, to prove not records that are in the book, but records that are not in the book.

THE COURT: Precisely; and the Court thinks it is admissible for that purpose. You offer it for the purpose of showing what?

MR. NIELDS: The non-receipt of money sued for in this case.

THE COURT: That entries, which should properly have been made in that book, if the dividends had been paid, were not entered in that book?

MR. NIELDS: Exactly.

THE COURT: The Court rules that that is a proper offer of testimony.

MR. C. BIDDLE: My grounds of objection are the incompetency of the witness and the improper purpose for which the book is offered, therefore, they are irrelevant and improper and should not be admitted.

(Exception noted for defendant.)"

Fourth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 348):

5. That the learned trial Judge erred in admitting the following question and answer (R., p. 216):

"Q. Have you made an examination of that book with reference to any entry as to a receipt, by the United States, of any dividend from the Chesapeake and Delaware Canal Company?

A. I have.

Q. As a result of that investigation will you state to this Court and jury whether or no there is any entry in that official document showing the receipt by the United States of any payment on account of dividends of the Chesapeake and Delaware Canal Company paid to the United States?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled. (Exception noted for defendant.)"

Fifth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action:

6. That the learned trial Judge erred in admitting the following questions and answers (R., p. 217):

"Q. Is there, or not, any record of the receipt of any sum of money on account of dividends from the Chesapeake and Delaware Canal Company in that book?

MR. C. BIDDLE: I object, as being leading.

THE COURT: The objection is sustained.

Q. What entries, if any, are there in that book with reference to the receipt of moneys from the defendant in this case?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled. (Exception noted for defendant.)"

Sixth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 349):

7. That the learned trial Judge erred in admitting the following books and papers in evidence set out on Record, pages 236-237:

"At this time I simply tender in evidence the receipts and disbursements of the United

States, beginning with the year from 1872 to 1880, inclusive, 1881 to 1888, inclusive, 1889 to 1895, inclusive, 1896 to 1900, inclusive, 1901 to 1906, inclusive, 1907 to 1911, inclusive, and the years 1912, 1913 and 1914, they having all been marked for identification.

THE COURT: Are they not all included in A-1 to A-14 inclusive?

MR. NIELDS: No, sir. Eight volumes comprehend this list.

THE COURT: Then your offer is this, and this is what is being discussed:

‘I now offer these books in evidence, being the books which have been marked from A-1 to A-14, inclusive’?

MR. NIELDS: Yes, sir. In conformity with the suggestion of the Court I shall have to modify that tender, and confine the tender to this series of books about which I have been speaking. They are marked respectively A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8 and A-9, being from A-1 to A-9, both inclusive.

MR. BIDDLE: As this is a new offer I want to renew my objection which I have stated to the larger offer.

THE COURT: The greater includes the less.”

Seventh.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action:

8. That the learned trial Judge erred in making the following ruling (R., p. 240):

“These Governmental books are not to be treated as books of account—unlike a charge that deals with goods sold and delivered—they are altogether on a different plane. They are kept by officers, and sworn officers, and employees, whose sworn duty it is to faithfully discharge their duty; and the cases are absolutely unlike the case of pri-

vate individuals and the case of the public books of the United States. . . .”

Eighth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 350):

9. That the learned trial Judge erred in making the following ruling (R., p. 242):

“ . . . The attorney for the United States should be permitted to show before this jury, if he can, that nowhere is there any—nowhere in any books of the Government—entry showing the receipt of these dividends. I do not know whether he can do it, or not, and whether that proposition includes more than he may be able to do. But now here, these books have been stated, by witnesses, as being the proper place in which to find certain entries if certain receipts had been had. Suppose it does not appear? Suppose it does not appear in the other books, which could be testified to? As I say, suppose it does not appear at all? That is a matter, it seems to the Court, which it is important the jury should take into consideration, not as conclusive, but taking it as sensible, reasonable men in the course of human probabilities. They are entitled to draw their inference.”

Ninth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action:

10. That the learned trial Judge erred in admitting the books in evidence set out in the following exhibits (R., p. 244):

“(The books admitted in evidence, subject to objection, are marked respectively,

'Government's Exhibit No. 78,' 'Government's Exhibit No. 79,' 'Government's Exhibit No. 80,' 'Government's Exhibit No. 81,' 'Government's Exhibit No. 82,' 'Government's Exhibit No. 83,' 'Government's Exhibit No. 84,' 'Government's Exhibit No. 85,' and 'Government's Exhibit No. 86.')

Tenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 351):

11. That the learned trial Judge erred in making the following ruling on the evidence of Henry C. Pearson, and the exhibits therein referred to (R., p. 245):

"Q. Do you find a record of any payment made by the Chesapeake and Delaware Canal Company for any dividend declared by it to the United States after June 1st, 1873?

MR. C. BIDDLE: I object to the question as being incompetent and improper.

THE COURT: The objection is overruled. (Exception noted for defendant.)

MR. C. BIDDLE: It is understood between counsel that all of this witness' testimony is taken subject to the objection of defendant's counsel that it is irrelevant, incompetent hearsay and inadmissible.

Q. From the examination you have made of Government's Exhibits Nos. 78 to 86, inclusive, did you find any entry of a sum of money paid to the United States by the Chesapeake and Delaware Canal Company, or the Delaware and Chesapeake Canal Company, during the period covered by these exhibits?

A. I did.

Q. From the examination that you made of Government's Exhibits Nos. 78 to 86, both inclusive, did you find any record of the receipt of any payment to the United States

after June 1st, 1873, by the Chesapeake and Delaware Canal Company, or the Delaware and Chesapeake Canal Company?

A. I did not."

Eleventh.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 351):

12. That the learned trial Judge erred in admitting the following book in evidence (R., pp. 247-248):

"Q. Will you state to the Court and jury what this book is?

A. That is a combination of all the receipts of the Government, and from various sources, by fiscal years, from 1789, the formation of the Government, up to 1905 or 1906, and in one case 1913.

Q. Where is this book kept?

A. It is kept with the others, right in my charge.

Q. In the Treasury Department of the United States?

A. In the Treasury Department of the United States, yes, sir.

MR. NIELDS: I ask that this be marked for identification.

(Book, marked for identification, 'Government's Exhibit No. 14-A,' as of this date.)

I now offer that in evidence.

THE COURT: For what purpose?

MR. NIELDS: For the purpose of showing non-receipt, by the United States, of any sum of money after June 1st, 1873, on account of dividends from this defendant.

THE COURT: During the period covered by the book?

MR. NIELDS: Yes, sir.

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled. (Exception noted for defendant.)

(Book admitted in evidence, subject to the objection, and marked 'Government's Exhibit No. 91.')

Twelfth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 352):

13. That the learned trial Judge erred in refusing the motion to strike out as follows (R., pp. 261-262):

"MR. GRAY: I want to move to strike out Government's Exhibits Nos. 11, 12, 13, 14, 16, 16-A, 16-B, 16-C and 66.

(Mr. Gray here presents further argument in support of his motion to strike out.)

That being so, these exhibits here are exhibited by the Government, and not by us, and they are immaterial. I, therefore, ask that they be stricken out.

THE COURT: The Court declines to grant the motion.

(Exception noted for defendant.)"

Thirteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 353):

14. That the learned trial Judge erred in charging the jury as follows (R., p. 267):

"This case turns upon the single question of payment or non-payment of the dividends by the Canal Company to the United States. It is the only disputed point for your consideration. If the dividends were paid by the Canal Company to the United States, as contended on behalf of the company, the United States has no claim to enforce in this

action and your verdict should be for the defendant. On the other hand, if the Canal Company has failed to pay the dividends to the United States, as contended by the District Attorney, it is entitled to recover their amount in this action, and your verdict should be for the plaintiff.

(The defendant did then and there except to such charge. [R., p. 272.]")

Fourteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 353):

16. That the learned trial Judge erred in charging the jury as follows (R., p. 272):

"The defendant has adduced no evidence, but rests solely upon the disputable presumption of payment. This being a civil action and not a criminal prosecution, the law does not require proof beyond a reasonable doubt, but only a preponderance of evidence to establish the non-payment of the dividends. Had the suit been brought within the twenty years, the defendant would have been required, in order to sustain a plea of payment, to produce only a preponderance of the evidence to support it; and as the result of the lapse of more than twenty years before the institution of suit is to impose upon the United States the burden of proving non-payment, equally that can be done by a preponderance of the evidence in the case, oral or documentary, direct and circumstantial.

(The defendant did then and there except to such charge. [R., p. 273.]")

Fifteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming

part of the record in the above-entitled action (R., p. 354):

17. That the learned trial Judge erred in charging the jury as follows (R., pp. 269-270):

"If the United States shows non-payment, it is sufficient. It is not necessary to show that the United States was hindered or prevented from suing earlier. Nor is it necessary to show that the officers of the United States were justified in waiting so long before bringing this suit or to explain just why suit was not brought earlier. The rule requiring proof beyond a reasonable doubt has no application to this case. Mere carelessness or negligence on the part of the officials of the United States in omitting earlier to institute proceedings for the collection of the dividends in question cannot, aside from the shifting of the burden of proof from the defendant to the United States as above mentioned, in any manner or to any extent constitute a defense to the claim made by the United States in this action, or injuriously affect the United States in its prosecution. Such is the settled law, and you are, therefore, instructed, if the United States has shown non-payment of the dividends, not to permit any idea or suggestion of mere laches, whether consisting of negligence or carelessness on the part of the officers or employees or agents of the United States in not sooner causing this action to be instituted, or in not earlier ascertaining or discovering the fact that the dividends in question had been declared in favor of the United States, in any manner to influence your action as jurors in reaching a verdict in this case.

(The defendant did there and then except to such charge. [R., pp. 273-274.])"

Sixteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals

of the following assignment of error forming part of the record in the above-entitled action (R., p. 355):

18. That the learned trial Judge erred in charging the jury as follows (R., p. 271):

"The Court has been requested to give you instructions on a number of points of law in the language employed by counsel. The charge of the Court embraces in substance all of the propositions suggested by counsel in so far as those propositions are, in the opinion of the Court, properly applicable to the case.

(The defendant did there and then except to such charge. [R., p. 275.]")

Seventeenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 355):

19. That the learned trial Judge erred in charging the jury as follows (R., p. 271):

"There is a *prima facie* presumption that public officers duly perform their duty, and consequently in favor of the regularity of their official acts and records. And this presumption applies to the acts and records of the Treasury Department of the United States.

(The defendant did there and then except to such charge. [R., p. 275.]")

Eighteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 355):

20. That the learned trial Judge erred in charging the jury as follows (R., pp. 271-272):

"If on the evidence taken as a whole you find that the dividends in question have not

been paid by the Canal Company to the United States, you will find a verdict for the plaintiff in a sum equal to the fifty-one thousand one hundred and eighty-seven dollars and fifty cents and interest thereon at the rate of 6 per cent. from November 17th, 1911, until the day of the rendition of your verdict. If you do not so find, your verdict should be for the defendant.

(The defendant did there and then except to such charge. [R., p. 276.]")

Nineteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 356):

21. That the learned trial Judge erred in his charge to the jury, inasmuch as the same was insufficient, inadequate and misleading.

“(The defendant did there and then except to such charge. [R., p. 276.]”)”

Twentieth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 356):

22. That the learned trial Judge erred in declining to instruct the jury in the language of defendant's request, as follows (R., pp. 265-266):

“If you believe that by reason of the laches or carelessness of the employees of the Government, the United States failed to take any action to recover these dividends during the twenty years prior to the beginning of this suit and has shown you no reason for this delay and the defendant has made no acknowledgment of the debt, the plaintiff is not entitled to recover in this case.

(The defendant did there and then except to such refusal. [R., p. 276.]”

Twenty-first.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 356):

23. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., pp. 265-266):

“If by reason of the laches of the employees of the Government, the Government has failed during the twenty years prior to the bringing of this suit to do that which the law says it must do to rebut the presumption of payment, your verdict must be for the defendant.

(The defendant did there and then except to such refusal. [R., p. 276.]”

Twenty-second.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 356):

24. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 266):

“The longer the Government has delayed in taking any steps to recover these dividends, the stronger is the presumption of payment, and where over thirty years have elapsed the evidence to rebut the presumption must be clear and convincing.

(The defendant did there and then except to such refusal. [R., p. 276.]”

Twenty-third.—The plaintiff in error assigns as error the dismissal by the United States Court of Ap-

peals of the following assignment of error forming part of the record in the above-entitled action (R., p. 358):

28. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

"When the United States becomes an actor in a court of justice, their rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and may by their conduct be estopped from recovering.

(The defendant did there and then except to such refusal. [R., p. 276.]")

Twenty-fourth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 358):

29. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

"The Government is subjected to the same rules respecting the burden of proof, and quantity and character of evidence, the presumption of law and fact, that attend the prosecution of a like action by an individual.

(The defendant did there and then except to such refusal. [R., p. 276.]")

Twenty-fifth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 358):

30. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264):

“The presumption of payment arising from the lapse of time is a presumption of fact and the evidence to overcome it must continue through the twenty years preceding the time when suit was brought.

(The defendant did there and then except to such refusal. [R., p. 276.]”

Twenty-sixth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 358):

31. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264):

“When a presumption of payment has arisen by reason of the lapse of twenty years, it gathers strength by additional years and can only be rebutted by clear and undoubted evidence, and the burden of producing this evidence is upon the plaintiff.

(The defendant did there and then except to such refusal. [R., p. 276.]”

Twenty-seventh.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 369):

32. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264):

“If no proceedings have been instituted to secure payment of a claim for twenty years, time has written upon the face of the claim a receipt, which is made stronger if no recognition of the claim has been obtained for thirty-five years, as in the present case. The burden is upon the plaintiff to show that the re-

ceipt thus written on the claim is invalid, otherwise they cannot recover.

(The defendant did there and then except to such refusal. [R., p. 276.]”

Twenty-eighth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 359):

33. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264):

“The law presumes a payment after the lapse of twenty years and will not permit a recovery unless the evidence offered to prove that the claim is still unpaid is in the opinion of the Court sufficiently strong, if believed, to rebut the presumption of payment.

(The defendant did there and then except to such refusal. [R., p. 276.]”

Twenty-ninth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 359):

34. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 264):

“The Government has long delayed asserting its rights as a stockholder of the defendant company without showing any sufficient reason or excuse for the delay; therefore they cannot recover interest in this case.

(The defendant did there and then except to such refusal. [R., p. 276.]”

Thirtieth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals

of the following assignment of error forming part of the record in the above-entitled action (R., p. 360):

35. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 265):

"The books of the Government are not evidence to show by the absence of entries thereon that these dividends were not received, nor can the presumption of payment be rebutted by evidence of a negative character; the books are only evidence in regard to affirmative or positive entries, either of debt or credit.

(The defendant did there and then except to such refusal. [R., p. 276.]")

Thirty-first.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 360):

36. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 265):

"Under the law and the evidence in this case, the verdict of the jury must be for the defendant.

(The defendant did there and then except to such refusal. [R., p. 276.]")

Thirty-second.—The said Circuit Court of Appeals for the Third Circuit before which was heard the writ of error which brought up the record of this action in the District Court of the United States for the Eastern District of Delaware erred in making its order on the thirty-first day of March, 1917, affirming the judgment of the said District Court and directing the mandate to issue to the said District Court directing that Court to proceed in accordance with the

decision and order of said Circuit Court of Appeals. (R., p. 378.)

Thirty-third.—That the learned Circuit Court of Appeals for the Third Circuit erred in not making an order upon the law and evidence in the case reversing the judgment of said District Court of the United States for the District of Delaware and directing the said District Court of the United States for the District of Delaware to enter judgment in favor of the defendant, the Chesapeake and Delaware Canal Company (R., p. 378).

Thirty-fourth.—That the learned Circuit Court of Appeals erred in holding as follows (R., p. 372):

“We shall not discuss at length the question whether the ten exhibits complained of were admissible evidence. They did not need to be certified; they were not copies, but were themselves the records kept in the Treasury, and their authenticity is not denied. In our opinion, they were competent evidence.”

Thirty-fifth.—That the learned Circuit Court of Appeals erred in holding as follows (R., p. 374):

“We do not agree, that before the Government should be allowed to prove the fact of non-payment it was bound (as a separate obligation) to explain or excuse the delay.”

Thirty-sixth.—That the learned Circuit Court of Appeals erred in ruling as follows (R., p. 374):

“Even if we assume that a private suitor might be obliged to explain or excuse his prolonged failure to sue, this merely requires him to account for his laches or negligence, and, as the sovereign is not bound by the laches of his agents, he cannot be compelled to explain a neglect that he may wholly disregard.”

Thirty-seventh.—That the learned Circuit Court of Appeals erred in holding as follows (R., p. 374):

“When the statute of limitations is interposed as a defense, the question of payment becomes of no importance; the plaintiff cannot recover, although it may be certain that he has not been paid; but where the statute does not apply (and it does not in the present case) the issue of payment is the vital matter.”

Thirty-eighth.—That the learned Circuit Court of Appeals erred in holding as follows (R., p. 375):

“In the end, all he is bound to prove is non-payment, and in fulfilling that obligation explanations or excuses are merely steps in the proof.”

Thirty-ninth.—That the learned Circuit Court of Appeals erred in holding as follows (R., p. 378):

“In this respect every case must stand on its own footing, and concerning the present record we shall say nothing more except that a careful study has satisfied us, not only that the trial Judge could not properly have directed a verdict for the company, but also that the evidence carries clear conviction that the dividends in question have never been paid.”

Fortieth.—That the learned Circuit Court of Appeals erred in ruling as follows (R., p. 378):

“We see no need to discuss the assignments of error in detail; no reversible error was committed in the conduct of the trial, and the judgment must therefore be affirmed.”

Forty-first.—That the learned Circuit Court of Appeals erred in not sustaining the writ of error then before it and in not reversing the judgment entered in this action by the said District Court of the United States for the District of Delaware.

And the plaintiff in error, the Chesapeake and Delaware Canal Company, prays that the judgment aforesaid entered herein in the Circuit Court of the United States for the Eastern District of Pennsylvania, and the order entered herein as aforesaid by the United States Circuit Court of Appeals for the Third Circuit and the judgment of affirmance entered in said Circuit Court upon said order of affirmance, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, be reversed, annulled and altogether held for naught, and that the plaintiff in error may be restored to all things which it hath lost by reason of said judgment and order.

CHARLES BIDDLE,
JOHN G. JOHNSON,

Per A. B.,

Attorneys for Plaintiff in Error.

April 13, 1917.

IN THE SUPREME COURT OF THE UNITED STATES.

Chesapeake and Delaware
Canal Company,
Defendant below,
Plaintiff in Error,

v.

The United States of
America,
Plaintiff below,
Defendant in Error.

October Term, 1917.
No.

PETITION FOR WRIT OF ERROR TO SUPREME
COURT.

(Filed April 13, 1917.)

*To the Honorable the Justices of the United States,
for the Third Circuit:*

Your petitioner, Chesapeake and Delaware Canal Company a corporation of the State of Delaware,

RESPECTFULLY SHOWS:

That on the fourth day of March, 1912, the United States brought suit in the District Court of the United States for the District of Delaware, to recover the amount of three dividends declared by the defendant company in 1873, 1875 and 1876, which the Government claims is still unpaid.

A trial was had upon October 13, 1914, a verdict for the United States, the plaintiff, was directed, in the sum of \$60,111.19, and judgment entered thereon, which judgment was reversed upon an appeal to the Circuit Court of Appeals for the Third Circuit (223 Fed. 926). A new venire was issued, and on the second trial, January 10, 1916, a verdict of \$62,924.66 was rendered, upon which verdict a judgment was duly entered for the said amount upon January 21, 1916. Thereupon your petitioner being aggrieved by reason of said judgment against it, a writ of error was taken in the cause to the United States Circuit Court of Appeals.

That the said cause came on to be heard in the said United States Circuit Court of Appeals, for the Third Circuit, at March Term, 1916, and that the said Court on the thirty-first day of March, 1917, affirmed the judgment of the District Court of Delaware in favor of the United States, and filed an opinion to that effect, and directed a mandate to issue to the said District Court to proceed in accordance with said decision and order as will appear by reference to the record and proceedings in said cause, which is hereto attached.

Your petitioner says that it is aggrieved by reason of the judgment of the Circuit Court of Appeals for the Third Circuit in the above-entitled action, and the cause is one for review by writ of error according to the statutes of the United States, the United States being a party hereto and the amount of the judgment

being for over \$1000 the decision of the United States Court of Appeals is not final.

Your petitioner further says that this petition for a writ of error is not filed for purposes of delay, but because it believes there is manifest error in the proceedings aforesaid, and that the same should be reversed.

Wherefore, your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States and for a citation, and it will ever pray, etc.

CHESAPEAKE AND DELAWARE
CANAL COMPANY,

By WALTER HALL,

(Seal)

President.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } ss.:

WALTER HALL, being duly affirmed according to law, declares and says that he is the president of the defendant company, the Chesapeake and Delaware Canal Company; that the said company is the petitioner in the foregoing petition and that the facts therein set forth are true to the best of his knowledge, information and belief.

Affirmed and subscribed before me this 11th day of April, A. D. 1917. } WALTER HALL.

WM. H. WHITAKER,
(Seal) *Notary Public.*

Commission expires March 9, 1919.

Allowed April 13, 1917.

JOHN B. McPHERSON,
Circuit Judge.

IN THE SUPREME COURT OF THE UNITED STATES.

*Chesapeake and Delaware
Canal Company,*
Defendant below,
Plaintiff in Error,

v.

*The United States of
America,*
Plaintiff below,
Defendant in Error.

} October Term, 1917.
No.

BOND ON WRIT OF ERROR TO SUPREME
COURT.

(Filed April 13, 1917.)

KNOW ALL MEN BY THESE PRESENTS, That we, Chesapeake and Delaware Canal Company, as principal, and Fidelity and Deposit Company, Maryland, as surety, are held and firmly bound unto the United States of America, defendant in error, above named, in the sum of five hundred dollars (\$500) to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the eleventh day of April, 1917.

Whereas the above-named plaintiff in error, Chesapeake and Delaware Canal Company, has sued out a writ of error to the Supreme Court of the United States to reverse the judgments in the above-entitled cause by the United States Circuit Court of Appeals for the Third Circuit and the Circuit Court of the United States for the Eastern District of Pennsylvania in the above-entitled cause.

Now, therefore, the condition of this obligation is such that the above-named Chesapeake and Delaware Canal Company shall prosecute said writ to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

CHESAPEAKE AND DELAWARE
CANAL COMPANY,

(Seal) By WALTER HALL,
President.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

(Seal) HERMAN HOOPES,
Resident Vice-President.

Attest:

M. E. HALL,
Resident Assistant Secretary.

WRIT OF ERROR TO SUPREME COURT.

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit,

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between the Chesapeake and Delaware Canal Company, and the United States of America, a manifest error hath happened, to the great damage of the said Chesapeake and Delaware Canal Company, as by their complaint appears. We being willing that error,

if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White,
Chief Justice of the United States, the
(Seal) fourteenth day of April, in the year of
our Lord one thousand nine hundred and
seventeen.

SAUNDERS LEWIS, JR.,
Clerk, United States Circuit Court of Appeals,
For the Third Circuit.

Allowed by
JOHN B. McPHERSON,
Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *set.:*
THIRD JUDICIAL CIRCUIT,

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court in the case of Chesapeake and Delaware Canal Company, Plaintiff in Error, v. The United States of America, No. 2118, on file, and now remaining among the records of said court, in my office.

(Seal) In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at Philadelphia, this twentieth day of April, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and thirty-first.

SAUNDERS LEWIS, JR.,
*Clerk of the U. S. Circuit Court
of Appeals, Third Circuit.*

DEC 28 1918

JAMES D. MAHER,

CLERK

No. **192**

October Term, 1917.

IN THE
Supreme Court of the United States.

CHESAPEAKE AND DELAWARE CANAL COMPANY
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

In Error to the United States Circuit Court of Ap-
peals for the Third Circuit.

Brief for the Chesapeake and Delaware Canal Company,
Plaintiff in Error.

ANDREW C. GRAY,
CHARLES BIDDLE,
J. RODMAN PAUL,
Attorneys for Plaintiff in Error.

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IN THE
Supreme Court of the United States.

October Term, 1917. No. 506.

CHESAPEAKE AND DELAWARE CANAL
COMPANY,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE CHESAPEAKE AND DELA-
WARE CANAL COMPANY, PLAINTIFF IN
ERROR.

STATEMENT OF THE CASE.

Prior to the year 1873 the United States, the plaintiff below, was a large stockholder in the Chesapeake and Delaware Canal Company, the defendant in this case.

The Canal Company declared dividends upon their stock on the thirtieth day of June, 1873; on the thirtieth day of June, 1875, and on the thirtieth day of June, 1876. On **March 4, 1912**, the United States brought an action of trespass on the case; and in their declaration claimed that the Canal Company became indebted to them upon June 30, 1873, by reason of the

dividend declared upon their stock upon that day, in the sum of \$21,937.50; and in the sum of \$14,625, the amount of the dividend declared upon the stock held by the United States on June 30, 1875; and in the further sum of \$14,625, the dividend declared upon June 30, 1876, together with interest.

The declaration further set out that a demand was made for these dividends on the 17th of November, 1911; that the demand was not complied with, and the present suit was instituted. The defendant pleaded nonassumpsit, release, statute of limitations and payment. A demurrer to the statute of limitations was sustained.

On October 12, 1914, a jury was called and the United States Government established that they were stockholders of the Chesapeake and Delaware Canal Company; that dividends had been declared on their stock in 1873, 1875 and 1876; that demand for the payment of these dividends was made on November 17, 1911, and payment refused. The case was then closed, and the Court directed a verdict in favor of the plaintiff for the amount of the dividends with interest, holding **that the presumption of payment that would arise in the case of an individual after the lapse of over twenty years did not arise when the United States was the party plaintiff.** This ruling of the lower Court was reversed by the United States Court of Appeals (223 Fed. 926), the latter holding *inter alia* that "the sovereign should be required to prove his right and to prove it with the same strictness and according to the same rules as prevail in other cases," and that the presumption of payment arising against the United States after twenty years must be rebutted, as in the case of any other suitor.

On January 4, 1916, a second jury was called. The Government again proved the facts established at the first trial, and in addition produced a witness named

Wilson, who testified that he and a man named Leslie embezzled the moneys provided by the Canal Company for the payment of the dividends when they were declared, over thirty-five years ago, and that the dividends were not paid out of the treasury of the company up to 1886, when he fled the country. To corroborate the story of Wilson, most of the testimony which makes this large record, was produced. Additional witnesses were called, who testified that the receipts and entries in the books of the Canal Company—the last one of which was made in 1877—were forgeries. The truth of this was not questioned by the defendant. They claimed that this might all be true, but that additional evidence must be offered to show that payment of these dividends had not been made during the twenty years prior to suit; that what occurred prior to the twenty years did not rebut a presumption of payment that subsequently arose.

No explanation was given for the delay by the United States of over thirty-five years in requesting payment. The only additional evidence produced by the plaintiff other than the evidence that the money had originally been embezzled, was that given by a witness named Henry C. Pearson. He produced a book, "Exhibit No. 91," which he said was a compilation of postings from printed reports which contained the combined statements of the receipts and disbursements of the United States, made up by the Chief of the Division of Bookkeeping and Warrants of the Treasury, and sent to the Secretary of the Treasury. The printed reports, from which "Exhibit 91" was posted, were admitted in evidence, and marked Exhibits Nos. 78 to 86. Exhibits 78 to 86 were reports sent by the Division of Public Moneys to the Division of Bookkeeping and Warrants, the former division getting the data for these reports from transcripts of the books of the Assistant Treasurer at the Sub-

Treasury in Philadelphia. The dividends on the defendant's stock were always paid in Philadelphia, and entered on the books of the Sub-Treasury in that city. The witness testified that he had examined these printed reports and found **no entry of the payment of any dividends to the United States by the Chesapeake and Delaware Canal Company after June 1, 1873.**

The defendant offered no evidence and asked the Court to give binding instructions to the jury in favor of the defendant, on the ground that the presumption of payment could not be rebutted by merely producing reports made by the plaintiff and showing that no entry of payment could be found in them. The Court refused to so charge, and submitted the case to the jury under what is alleged to have been erroneous instructions. A verdict was rendered against the defendant for \$63,924.66, and the judgment entered by the Court was sustained by the United States Circuit Court of Appeals for the Third Circuit, hence this appeal.

STATEMENT OF THE QUESTIONS INVOLVED.

The United States is subject to the same rules of evidence in the trial of causes as any other suitor. The presumption of payment of the present claim has arisen by the lapse of between thirty-five and forty years of unexplained delay in demanding payment, this presumption must therefore be rebutted before a recovery will be allowed.

- QUESTION 1.** What evidence did the Government produce to rebut the presumption of payment?
- QUESTION 2.** Are the United States reports admissible to show **THAT NO ENTRY OF THE PAYMENT** of the dividends appears in them?

- QUESTION 3. Can these reports be admitted for any purpose unless they are books of original entry or public records properly certified? Can reports not made for public distribution, but made by one division of the United States Treasury to another division, be admitted in evidence and prove themselves?
- QUESTION 4. Can such evidence rebut the presumption of payment that has arisen in this case?
- QUESTION 5. Did the trial Judge properly instruct the jury? Should he not have given binding instructions in favor of the defendant below?

THE ERRORS ASSIGNED AND RELIED UPON.

First.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 346):

“2. That the learned trial Judge erred in overruling the objection to the competency of the witness, Henry C. Pearson, as follows (R., pp. 206-207):

“ ‘MR. C. BIDDLE: I object to this witness testifying to the contents of that book, in any way. It was not kept by him, and he had nothing whatever to do with it; therefore, he is not competent to testify as to what that book contains, or does not contain.

THE COURT: The Court is only prepared to rule to this extent at the present time: If this witness swears that that book is an official book of the United States, kept by the public authorities pursuant to law, then he can state, if he is able, that he has examined that book, and that he finds, or does not find, certain things. The Court will allow that to be done.

(Exception noted for defendant.)’ ”

Third.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 347):

“4. That the learned trial Judge erred in overruling the objection of the defendant, as follows (R., pp. 214-215):

“ ‘By THE COURT:

Q. Have you, or not, knowledge as to whether the book just referred to is a public record of the United States?

A. I have a knowledge, Judge, because I was in the office of the Register of the Treasury and assisted the clerk who compiled this book by comparing with him as to the aggregate and the individual amount of receipts.

Q. You say you assisted the clerk in compiling a book. I want to know whether you assisted the clerk in compiling this book?

A. Yes, sir; I did, in that way.

MR. C. BIDDLE: I object. The witness has produced a printed copy of a book which is called “Combined Statement of the Receipts and Disbursements, Apparent and Actual, of the United States, for the fiscal year ending June thirtieth, 1872,” and on the outside of the book the dates are “1872 to 1880.” He has testified that he assisted a clerk in combining these records, which consisted of records for the different years. I see here from 1872 to 1880, in different batches, and bound together, but different years. This book is being offered and the testimony of this witness is being produced for the purpose, not of proving entries in this book, but for the purpose of proving that entries are not in this book. This book cannot be offered in evidence for that purpose. First of all, this witness is not competent to testify, merely because he assisted some clerk in bringing this printed statement together. That does not make him competent to testify to these various entries, when they were made or how they were made. He has had no part whatever in mak-

ing the entries there printed in this book. He has brought them together, and assisted a clerk in combining. He is, therefore, incompetent to testify as to the contents of that book, and the book is offered for an improper purpose, namely, to prove not records that are in the book, but records that are not in the book.

THE COURT: Precisely; and the Court thinks it is admissible for that purpose. You offer it for the purpose of showing what?

MR. NIELDS: The nonreceipt of money sued for in this case.

THE COURT: That entries, which should properly have been made in that book, if the dividends had been paid, were not entered in that book?

MR. NIELDS: Exactly.

THE COURT: The Court rules that that is a proper offer of testimony.

MR. C. BIDDLE: My grounds of objection are the incompetency of the witness and the improper purpose for which the book is offered, therefore, they are irrelevant and improper and should not be admitted.

(Exception noted for defendant.)' "

Fourth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 348):

"5. That the learned trial Judge erred in admitting the following question and answer (R., p. 216):

"Q. Have you made an examination of that book with reference to any entry as to a receipt, by the United States, of any dividend from the Chesapeake and Delaware Canal Company?

A. I have.

Q. As a result of that investigation will you state to this court and jury whether or no there is any entry in that official document showing the receipt by the United States of any payment on ac-

count of dividends of the Chesapeake and Delaware Canal Company paid to the United States?

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.
(Exception noted for defendant.)' "

Sixth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 349):

"7. That the learned trial Judge erred in admitting the following books and papers in evidence set out on Record, pages 236-237:

" 'At this time I simply tender in evidence the receipts and disbursements of the United States, beginning with the year from 1872 to 1880, inclusive, 1881 to 1888, inclusive, 1889 to 1895, inclusive, 1896 to 1900, inclusive, 1901 to 1906, inclusive, 1907 to 1911, inclusive, and the years 1912, 1913 and 1914, they having all been marked for identification.

THE COURT: Are they not all included in A-1 to A-14 inclusive?

MR. NIELDS: No, sir. Eight volumes comprehend this list.

THE COURT: Then your offer is this, and this is what is being discussed:

"I now offer these books in evidence, being the books which have been marked from A-1 to A-14, inclusive"?

MR. NIELDS: Yes, sir. In conformity with the suggestion of the Court I shall have to modify that tender, and confine the tender to this series of books about which I have been speaking. They are marked respectively A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8 and A-9, being from A-1 to A-9, both inclusive.

MR. BIDDLE: As this is a new offer I want to renew my objection which I have stated to the larger offer.

THE COURT: The greater includes the less.' "

Seventh.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action:

“8. That the learned trial Judge erred in making the following ruling (R., p. 240):

“ ‘These Governmental books are not to be treated as books of account—unlike a charge that deals with goods sold and delivered—they are altogether on a different plane. They are kept by officers, and sworn officers, and employees, whose sworn duty it is to faithfully discharge their duty; and the cases are absolutely unlike the case of private individuals and the case of the public books of the United States. . . .’ ”

Eighth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 350):

“9. That the learned trial Judge erred in making the following ruling (R., p. 242):

“ ‘. . . The attorney for the United States should be permitted to show before this jury, if he can, that nowhere is there any—nowhere in any books of the Government—entry showing the receipt of these dividends. I do not know whether he can do it, or not, and whether that proposition includes more than he may be able to do. But now here, these books have been stated, by witnesses, as being the proper place in which to find certain entries if certain receipts had been had. Suppose it does not appear? Suppose it does not appear in the other books, which could be testified to? As I say, suppose it does not appear at all? That is a matter, it seems to the Court, which it is important the jury should take into consideration, not as conclusive, but taking it as sensible, reasonable men in the course of human probabilities. They are entitled to draw their inference.’ ”

Ninth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action:

“10. That the learned trial Judge erred in admitting the books in evidence set out in the following exhibits (R., p. 244):

“(The books admitted in evidence, subject to objection, are marked respectively, “Government’s Exhibit No. 78,” “Government’s Exhibit No. 79,” “Government’s Exhibit No. 80,” “Government’s Exhibit No. 81,” “Government’s Exhibit No. 82,” “Government’s Exhibit No. 83,” “Government’s Exhibit No. 84,” “Government’s Exhibit No. 85,” and “Government’s Exhibit No. 86.”)”

Tenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 351):

“11. That the learned trial Judge erred in making the following ruling on the evidence of Henry C. Pearson, and the exhibits referred to (R., p. 245):

“Q. Do you find a record of any payment made by the Chesapeake and Delaware Canal Company for any dividend declared by it to the United States after June 1st, 1783?

MR. C. BIDDLE: I object to the question as being incompetent and improper.

THE COURT: The objection is overruled.
(Exception noted for defendant.)

MR. C. BIDDLE: It is understood between counsel that all of this witness’s testimony is taken subject to the objection of defendant’s counsel that it is irrelevant, incompetent hearsay and inadmissible.

Q. From the examination you have made of Government’s Exhibits Nos. 78 to 86, inclusive, did you find any entry of a sum of money paid to the

United States by the Chesapeake and Delaware Canal Company, or the Delaware and Chesapeake Canal Company, during the period covered by these exhibits?

A. I did.

Q. From the examination that you made of Government's Exhibits Nos. 78 to 86, both inclusive, did you find any record of the receipt of any payment to the United States after June 1st, 1873, by the Chesapeake and Delaware Canal Company, or the Delaware and Chesapeake Canal Company?

A. I did not.' "

Eleventh.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 351):

"12. That the learned trial Judge erred in admitting the following book in evidence (R., pp. 247-248):

" 'Q. Will you state to the Court and jury what this book is?

A. That is a combination of all the receipts of the Government, and from various sources, by fiscal years, from 1789, the formation of the Government, up to 1905 or 1906, and in one case 1913.

Q. Where is this book kept?

A. It is kept with the others, right in my charge.

Q. In the Treasury Department of the United States?

A. In the Treasury Department of the United States, yes, sir.

MR. NIELDS: I ask that this be marked for identification.

(Book, marked for identification, "Government's Exhibit No. 14-A," as of this date.)

I now offer that in evidence.

THE COURT: For what purpose?

MR. NIELDS: For the purpose of showing non-receipt, by the United States, of any sum of money

after June 1st, 1873, on account of dividends from this defendant.

THE COURT: During the period covered by the book?

MR. NIELDS: Yes, sir.

MR. C. BIDDLE: I object.

THE COURT: The objection is overruled.

(Exception noted for defendant.)

(Book admitted in evidence, subject to the objection, and marked "Government's Exhibit No. 91.")' "

Twelfth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 352):

"13. That the learned trial Judge erred in refusing the motion to strike out as follows (R., pp. 261-262):

"MR. GRAY: I want to move to strike out "Government's Exhibits Nos. 11, 12, 13, 14, 16, 16-A, 16-B, 16-C and 66."

.

(Mr. Gray here presents further argument in support of his motion to strike out.)

That being so, these exhibits here are exhibited by the Government, and not by us, and they are immaterial. I therefore ask that they be stricken out.

THE COURT: The Court declines to grant the motion.

(Exception noted for defendant.)' "

Thirteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 353):

"14. That the learned trial Judge erred in charging the jury as follows (R., p. 267):

“ ‘This case turns upon the single question of payment or non-payment of the dividends by the Canal Company to the United States. It is the only disputed point for your consideration. If the dividends were paid by the Canal Company to the United States, as contended on behalf of the company, the United States has no claim to enforce in this action and your verdict should be for the defendant. On the other hand, if the Canal Company has failed to pay the dividends to the United States, as contended by the District Attorney, it is entitled to recover their amount in this action, and your verdict should be for the plaintiff.

(The defendant did then and there except to such charge. [R., p. 272.]’ ”

Fourteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 353):

“16. That the learned trial Judge erred in charging the jury as follows (R., p. 272):

“ ‘The defendant has adduced no evidence, but rests solely upon the disputable presumption of payment. This being a civil action and not a criminal prosecution, the law does not require proof beyond a reasonable doubt, but only a preponderance of evidence to establish the non-payment of the dividends. Had the suit been brought within the twenty years, the defendant would have been required, in order to sustain a plea of payment, to produce only a preponderance of the evidence to support it; and as the result of the lapse of more than twenty years before the institution of suit is to impose upon the United States the burden of proving non-payment, equally that can be done by a preponderance of the evidence in the case, oral or documentary, direct and circumstantial.

(The defendant did then and there except to such charge. [R., p. 273.]’ ”

Fifteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 354) :

“17. That the learned trial Judge erred in charging the jury as follows (R., pp. 269-270) :

“ ‘If the United States shows non-payment, it is sufficient. It is not necessary to show that the United States was hindered or prevented from suing earlier. Nor is it necessary to show that the officers of the United States were justified in waiting so long before bringing this suit or to explain just why suit was not brought earlier. The rule requiring proof beyond a reasonable doubt has no application to this case. Mere carelessness negligence on the part of the officials of the United States in omitting earlier to institute proceedings for the collection of the dividends in question cannot, aside from the shifting of the burden of proof from the defendant to the United States as above mentioned, in any manner or to any extent constitute a defense to the claim made by the United States in this action, or injuriously affect the United States in its prosecution. Such is the settled law, and you are, therefore, instructed, if the United States has shown non-payment of the dividends, not to permit any idea or suggestion of mere laches, whether consisting of negligence or carelessness on the part of the officers or employees or agents of the United States in not sooner causing this action to be instituted, or in not earlier ascertaining or discovering the fact that the dividends in question had been declared in favor of the United States, in any manner to influence your action as jurors in reaching a verdict in this case.

(The defendant did there and then except to such charge. [R., pp. 273-274.])’ ”

Sixteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 355) :

"18. That the learned trial Judge erred in charging the jury as follows (R., p. 271):

" 'The Court has been requested to give you instructions on a number of points of law in the language employed by counsel. The charge of the Court embraces in substance all of the propositions suggested by counsel in so far as those propositions are, in the opinion of the Court, properly applicable to the case.

(The defendant did there and then except to such charge. [R., p. 275.]' "

Eighteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 355):

"20. That the learned trial Judge erred in charging the jury as follows (R., pp. 271-272):

" 'If on the evidence taken as a whole you find that the dividends in question have not been paid by the Canal Company to the United States, you will find a verdict for the plaintiff in a sum equal to the fifty-one thousand one hundred and eighty-seven dollars and fifty cents and interest thereon at the rate of 6 per cent. from November 17th, 1911, until the day of the rendition of your verdict. If you do not so find, your verdict should be for the defendant.

(The defendant did there and then except to such charge. [R., p. 276.]' "

Nineteenth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 356):

"21. That the learned trial Judge erred in his charge to the jury, inasmuch as the same was insufficient, inadequate and misleading.

(The defendant did there and then except to such charge. [R., p. 276.]' "

Twentieth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 356):

“22. That the learned trial Judge erred in declining to instruct the jury in the language of defendant’s request, as follows (R., pp. 265-266):

“ ‘If you believe that by reason of the laches or carelessness of the employees of the Government the United States failed to take any action to recover these dividends during the twenty years prior to the beginning of this suit and has shown you no reason for this delay and the defendant has made no acknowledgment of the debt, the plaintiff is not entitled to recover in this case.

(The defendant did there and then except to such refusal. [R., p. 276.]’ ”

Twenty-first.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 356):

“23. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant’s request, as follows (R., pp. 265-266):

“ ‘If by reason of the laches of the employees of the Government, the Government has failed during the twenty years prior to the bringing of this suit to do that which the law says it must do to rebut the presumption of payment, your verdict must be for the defendant.

(The defendant did there and then except to such refusal. [R., p. 276.]’ ”

Twenty-second.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 356):

"24. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 266):

" 'The longer the Government has delayed in taking any steps to recover these dividends, the stronger is the presumption of payment, and where over thirty years have elapsed the evidence to rebut the presumption must be clear and convincing.

(The defendant did there and then except to such refusal. [R., p. 276.]' "

Twenty-third.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 358):

"28. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

" 'When the United States becomes an actor in a court of justice, their rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and may by their conduct be estopped from recovering.

(The defendant did there and then except to such refusal. [R., p. 276.]' "

Twenty-fourth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 358):

"29. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 263):

" 'The Government is subjected to the same rules respecting the burden of proof, and quantity and character of evidence, the presumption of

law and fact, that attend the prosecution of a like action by an individual.

(The defendant did there and then except to such refusal. [R., p. 276.]’ ’’

Twenty-fifth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 358):

“30. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant’s request, as follows (R., p. 264):

“ ‘The presumption of payment arising from the lapse of time is a presumption of fact and the evidence to overcome it must continue through the twenty years preceding the time when suit was brought.

(The defendant did there and then except to such refusal. [R., p. 276.]’ ’’

Twenty-sixth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 358):

“31. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant’s request, as follows (R., p. 264):

“ ‘When a presumption of payment has arisen by reason of the lapse of twenty years, it gathers strength by additional years and can only be rebutted by clear and undoubted evidence, and the burden of producing this evidence is upon the plaintiff.

(The defendant did there and then except to such refusal. [R., p. 276.]’ ’’

Twenty-seventh.—The plaintiff in error assigns as error the dismissal by the United States Court of Ap-

peals of the following assignment of error forming part of the record in the above-entitled action (R., p. 369):

“32. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant’s request, as follows (R., p. 264):

“ ‘If no proceedings have been instituted to secure payment of a claim for twenty years, time has written upon the face of the claim a receipt, which is made stronger if no recognition of the claim has been obtained for thirty-five years, as in the present case. The burden is upon the plaintiff to show that the receipt thus written on the claim is invalid, otherwise they cannot recover.

(The defendant did there and then except to such refusal. [R., p. 276.]’ ”

Twenty-eighth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 359):

“33. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant’s request, as follows (R., p. 264):

“ ‘The law presumes a payment after the lapse of twenty years and will not permit a recovery unless the evidence offered to prove that the claim is still unpaid is in the opinion of the Court sufficiently strong, if believed, to rebut the presumption of payment.

(The defendant did there and then except to such refusal. [R., p. 276.]’ ”

Thirtieth.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 360):

"35. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 265):

" 'The books of the Government are not evidence to show by the absence of entries thereon that these dividends were not received, nor can the presumption of payment be rebutted by evidence of a negative character; the books are only evidence in regard to affirmative or positive entries, either of debt or credit.

(The defendant did there and then except to such refusal. [R., p. 276.]' "

Thirty-first.—The plaintiff in error assigns as error the dismissal by the United States Court of Appeals of the following assignment of error forming part of the record in the above-entitled action (R., p. 360):

"36. That the learned trial Judge erred in declining to instruct the jury in the language of the defendant's request, as follows (R., p. 265):

" 'Under the law and the evidence in this case, the verdict of the jury must be for the defendant.

(The defendant did there and then except to such refusal. [R., p. 276.]' "

Thirty-second.—The said Circuit Court of Appeals for the Third Circuit, before which was heard the writ of error which brought up the record of this action in the District Court of the United States for the Eastern District of Delaware, erred in making its order on the thirty-first day of March, 1917, affirming the judgment of the said District Court and directing the mandate to issue to the said District Court directing that court to proceed in accordance with the decision and order of said Circuit Court of Appeals (R., p. 378).

Thirty-fourth.—That the learned Circuit Court of Appeals erred in holding as follows (R., p. 372):

“We shall not discuss at length the question whether the ten exhibits complained of were admissible evidence. They did not need to be certified; they were not copies, but were themselves the records kept in the Treasury, and their authenticity is not denied. In our opinion, they were competent evidence.”

Thirty-fifth.—That the learned Circuit Court of Appeals erred in holding as follows (R., p. 374):

“We do not agree, that before the Government should be allowed to prove the fact of non-payment it was bound (as a separate obligation) to explain or excuse the delay.”

Thirty-sixth.—That the learned Circuit Court of Appeals erred in ruling as follows (R., p. 374):

“Even if we assume that a private suitor might be obliged to explain or excuse his prolonged failure to sue, this merely requires him to account for his laches or negligence, and, as the sovereign is not bound by the laches of his agents, he cannot be compelled to explain a neglect that he may wholly disregard.”

Fortieth.—That the learned Circuit Court of Appeals erred in ruling as follows (R., p. 378):

“We see no need to discuss the assignments of error in detail; no reversible error was committed in the conduct of the trial, and the judgment must therefore be affirmed.”

Forty-first.—That the learned Circuit Court of Appeals erred in not sustaining the writ of error then before it and in not reversing the judgment entered in this action by the said District Court of the United States for the District of Delaware.

ARGUMENT.

This case turns upon the determination of the question whether the Government has established its right to recover the dividends on the stock of the defendant company which were declared over thirty-five years ago in the case of the last dividend, and over thirty-eight years in the case of the first dividend, before suit was brought. On the face of this claim the presumption of payment has arisen, has the Government failed to rebut it? To answer properly this question it should be understood that the United States, when a suitor in its courts, is bound by the same rules as an individual.

This would seem to be necessarily true. It would be hard to conceive of a court of justice where the people proved their claims by one rule of evidence and the sovereign by another.

The Circuit Court of Appeals in reversing the lower Court in the first trial of this case, 223 Federal Reporter, page 926, said, on page 929:

“The property of a citizen can only be taken
“according to the rules and forms of law, and,
“even if it be the sovereign who is striving to take
“it by an action in court, we think the sovereign
“also should be required to prove his right, and
“to prove it with the same strictness and accord-
“ing to the same rules as prevail in other cases.

“As a general proposition, this is scarcely
“open to dispute. In *U. S. v. Stinson*, 197 U. S.
“200, 25 Sup. Ct. 426, 49 L. Ed. 724. Speaking
“of a suit by the Government to set aside a grant
“of land, the Court said:

“The Government is subject to the same
“rules respecting the burden of proof, the quan-
“tity and character of evidence, the presumptions
“of law and fact, that attend the prosecution of
“a like action by an individual. It should be
“well understood that only that class of evidence

The black lettering in this brief of the decisions is ours.

“ ‘which commands respect, and that amount of it
 “ ‘which produces conviction, shall make such an
 “ ‘attempt successful.’ ”

“And in the *U. S. v. Beebee* (C. C.), 17 Fed.
 “40, Judge McCrary, citing numerous authorities,
 “stated the rule as follows:

“It is well settled that when the United
 “States becomes a party to a suit in the courts,
 “and voluntarily submits its rights to judicial
 “determination, it is bound by the same principles
 “that govern individuals. When the United States
 “voluntarily appears in a court of justice, it at the
 “same time voluntarily submits to the law, and
 “places itself upon an equality with other liti-
 “gants.”

“So, also, in *Mountain Copper Co. v. U. S.*
 “(C. C. A. 9th Cir.), 142 Fed. 629, 73 C. C. A. 625,
 “this language is used:

“It is the well-established law that, when the
 “Government comes into the court asserting
 “a property right, it occupies the position of any
 “and every other suitor. Its rights are precisely
 “the same; no greater, no less.” (Citing cases.)

Nothing further need be added to establish the
 proposition that the rules regulating the presumption
 of payment and the evidence necessary to rebut it, are
 the same in the case of an individual and in the case
 of the Government.

Under this ruling of the Court, at the second trial
 the Government was held bound to show that the divi-
 dends had not been paid.

I. WHAT EVIDENCE DID THEY PRODUCE FOR THIS PURPOSE?

**Attention Must First Be Called to the Fact That
 There Is No Conflict of Testimony.**

The greater part of the record is composed of evi-
 dence taken on the part of the plaintiff to establish a
 fact that was not disputed by the defendant. It was

established by this evidence that in 1873 a man named Wilson, in the employ of the Canal Company, appropriated to his own use and that of a man named Leslie, who conspired with him, the money that was provided for the payment of the dividends on the stock of the Chesapeake and Delaware Canal, owned by the United States. These men fled the country when their embezzlement was discovered in 1886, and a general settlement was made by the Canal Company with all the people who were known to have been defrauded. Wilson could testify as to nothing after the year 1886; that is, twenty-six years before the institution of the present suit. He testified that until he left the company and fled the country, the dividends had not been paid on the stock held by the United States Government out of the treasury of the Canal Company. He admitted that he and his partners in the embezzlement, paid debts due by the company when creditors made a demand upon them, and they in this way continuing their peculations.

The Evidence of Wilson Is Not Evidence to Rebut the Presumption of Payment, Which Arose by Reason of the Lapse of Twenty-six Years After the Period Covered by His Testimony.

The presumption of payment arises when the plaintiff allows twenty years to elapse before bringing suit and must be rebutted by evidence of nonpayment during the twenty years prior to the time of suit,

The testimony of Wilson is considered by the United States Court of Appeals (R., p. 373), as helping to rebut the presumption of payment. It is therefore important to consider whether it has any bearing upon the subject.

The plaintiff called a number of witnesses, and

an expert, to corroborate the story told by Wilson, and to establish the truth of his allegation that he had given false receipts to the Chesapeake and Delaware Canal Company, and had made false entries in their books, the last one in 1877. This corroborating testimony, which occupies nearly the whole record, established that Wilson and others embezzled the dividends when they were declared, and had made the necessary receipts to conceal their stealing. **Giving this evidence its full force, it shows that in 1873-1875-1876 this claim was not paid; and up to the year 1886 so far as the witness knew it had not been paid; let this be admitted; it does not rebut the presumption of payment that subsequently arose.**

It would seem to be a self-evident truth that a presumption can be rebutted only by evidence of facts that arise or are shown to have had a continued existence **during the time** which created the presumption. As this truth is generally admitted, few authorities can be found.

In **Levers v. VanBuskirk**, 7 Watts. & Serg. 70 (Pa. 1844), the suit was on a bond brought twenty-seven years after it was due. The Court refused to admit evidence of an ejectment in 1817, which was prior to the twenty years, saying (p. 75):

“As to the ejectment in 1817, that was more than twenty years before the present suit, and it does not appear how it could have any operation to rebut the presumption arising from the lapse of 20 years last preceding. We think that was not evidence, but the others were.”

In **Gregory v. Commonwealth**, 121 Pa. 611 (1888), suit was brought upon a recognizance twenty-one years and three months after the alleged liability

arose. The defense was the presumption of payment after twenty years. The Court said (p. 622):

"The facts and circumstances relied on to rebut the presumption must necessarily be within 20 years before suit is brought, and, as the recollection of the exact words and import of an oral admission must necessarily become more indistinct with the lapse of years, the force of such an admission will in general be lessened as the time from its occurrence increases. On the other hand, after 20 years, the presumption will gather strength with each succeeding year, and the evidence to overthrow it must, of course, be correspondingly increased." . . .

In **Porter v. Nelson**, 121 Pa. 628 (1888), the Court said (p. 638):

"The facts and circumstances relied on to rebut the presumption must necessarily exist within 20 years before suit brought."

In **Giles v. Baremore**, 5 Johns. Ch. 545 (N. Y., 1821), a bill for an accounting was brought on a bond and mortgage, both executed forty years before. The mortgagee was attainted, and by an act passed seven years before, the State granted to the plaintiff the right to sue in his own name on all debts due the attainted man. The defendant was not the original mortgagor and did not know whether the mortgage had ever been satisfied. The Court dismissed the bill on the ground that after twenty years there arose a strong presumption of payment against the State, which was not here rebutted. And the Court said (pp. 550, 551):

"These presumptions do not always proceed, as has been repeatedly observed (Lord Mansfield, in *Eldridge v. Knott*, Cowp. 214, and Sir William Grant, the Master of the Rolls, in *Hillary v. Waller*, 12 Vesey, 252), on the belief, that the thing presumed has actually taken place. A grant, which

is of course a matter of record, may be presumed against the crown, not that the Court really thinks, as Lord Mansfield has observed, that a grant has been made, because it is not probable a grant should have existed without its being upon record, but they presume the fact for the purpose, and from a principle, of quieting the possession.

"It is, therefore, well settled, that the presumption, that a demand has been satisfied, prevails as much in this court, as it does at law. **Claims, the most solemnly established upon the face of them, will be presumed to be satisfied after a certain length of time.** . . . These are principles of decision adopted and sanctioned in a variety of cases, and by a succession of learned Judges in the English Court of Chancery; and their solidity is not to be questioned, and they apply with the utmost propriety and force to the present case."

In *Rowland v. Windley*, 86 N. C. 36 (1882), there was an action upon a bond and the defendant relied upon the presumption of payment from lapse of time. The Supreme Court of North Carolina said (p. 37):

" . . . the presumption of payment, arising under the statute, from the lapse of time, is one which the law makes, and gives to it such artificial weight, that whenever the facts are known, the Court must apply it as a legal intendment; and so, too, that the question of its rebuttal is one of law, and as such, to be decided by the Court, whenever the facts are ascertained.

"His Honor, therefore, properly assumed the duty of determining the question in this case, there being no conflict in the testimony bearing upon the point.

"In the same case, relying upon the authority of *Powell v. Brinkley*, Busb. 154, it was said, that the presumption of payment under the statute, unlike that which is raised, by law, of the death of a party from a continued absence of seven years,

has reference to the **particular time at which the debt became due**, and that anything offered to repel the presumption—whether it be proof of insolvency or of actual nonpayment—**must, in order to be effectual, run through the entire period of ten years next after the maturity of the debt.**”

In **Runners Appeal**, 121 Pa. 649 (1888), the Court said (p. 653):

“ . . . and it is a well-established principle that credits indorsed on a bond, are not evidence of actual payment, **to rebut the presumption until proven or shown to have been made within twenty years and whilst it was contrary to the interest of the obligee to make them.**”

These authorities would seem all to accord with the position that to rebut the presumption of payment, the testimony offered **must relate** to the period of time the unexplained passage of which has created the presumption of payment.

Wilson knew nothing about the payment or non-payment of this claim after 1886, or about any facts, after he fled the country (R., pp. 137-139), and, for aught he knew, the debt may have been paid at the settlement that was made of his embezzlements in 1886. His testimony, therefore, **related to no facts** that arose, or so far as his testimony goes, were in existence during the twenty-six years prior to suit, and the effect of this twenty-six years **cannot be rebutted by anything that occurred prior to that time.** It must be shown that the claim was not paid during the twenty years that creates the presumption of payment. Whether it was paid or unpaid at some prior time is immaterial and it was error to instruct the jury that the only question was one of payment or nonpayment: without drawing their attention to any facts shown to exist during the twenty years prior

to this suit, and the learned Court erred in weighing any testimony given by Wilson in determining that the facts were sufficient to rebut the presumption of payment.

If the testimony of Wilson is not admissible to rebut the presumption of payment that arose after he left the country, the only other evidence offered was that of the reports. These reports were admitted for the purpose of **showing that they contained no entries of any kind relating to these dividends since 1873.**

II. IF THE UNITED STATES ARE SUBJECT TO THE SAME RULES OF EVIDENCE AS ANY OTHER SUITOR, ARE THE REPORTS SHOWING NO ENTRY OF THE RECEIPT OF DIVIDENDS SINCE 1873, EVIDENCE TO REBUT THE PRESUMPTION OF PAYMENT?

In the present case, the United States Reports were admitted, not to show what entries were in them, but to prove that there were no entries. For this purpose, it is respectfully submitted they were clearly inadmissible. **A plaintiff's books may on some occasions be admitted in evidence, but it must be to prove entries, not the lack of them.**

The Court of Appeals in their opinion, page 373 of the record, say:

"And the reasons just stated make such official records competent evidence to prove also the absence of entries that in the usual course should appear therein: U. S. v. Teschmaker, 63 U. S. 405; Amer. Surety Co. v. Pauly (C. C. A.), 72 Fed. 470; 3 Wig., Sec. 1633 (6), p. 1982; 3 Chamberlayne, Sec. 1757."

If we examine the authorities given by the Court, we find that in the case of U. S. v. Teschmaker, 63 U. S. 405, the plaintiff produced a paper which recited

that it had been placed upon the record. The Court permitted the record to be produced to show that such statement was untrue. This was certainly proper, but does not support the proposition of the plaintiff in this case, who produce their books to show that as there is no entry in them, it is evidence the United States had not been paid their dividends.

In *Amer. Surety Co. v. Pauly*, 72 Fed. 470, the other case cited by the Court, the plaintiff brought an action against a bank, alleged certain deposits, and the failure of the bank to account for such deposits. As a defense the bank was allowed to produce the plaintiff's account with them to show what appeared in it on both the debit and credit side. To object to this, as the Court said, was "simply frivolous." This again does not establish the right of a plaintiff to produce his own books and claim that no entry in them was evidence of the defendant's liability to pay.

The Court of Appeals also quotes Chamberlayne on Evidence, Vol. III, Sections 1757 and 1758. In the latter part of that section, Chamberlayne says:

"Self-serving **absences** not admissible.—An important qualification of this rule, so far as it relates to entries on books of account, remains to be noticed. The entrant must, it is said in many cases, be disinterested. It is not regarded as being good public policy that an accountant should be able to make evidence in his favor by the simple expedient of failing to enter an item in favor of another. Accordingly, it has been held that the fact that a set of books shows no receipt of goods, is not evidence that they were not delivered. Non-appearance on a party's books of any entry of the receipt of money, or assumption of a risk affords no inference that such payment was not received or contract made. In general, the mere self-serving absence of an entry on books of account is not evidence that there was no ground for making one."

The other authority quoted by the Court is Wigmore on Evidence, an examination of this authority shows that the cases referred to by the writer are those where the plaintiff has alleged that the defendant is his debtor, and the Court has permitted the defendant to produce his account with the plaintiff to show that in the debit side of the account there is no such item as the plaintiff claims, or again where the plaintiff has alleged a fact as having been recorded in some public record, the Court has permitted the defendant to produce such record to show that no entry of such event or deed appeared.

These authorities quoted by the Court and no other authority that counsel have been able to find, hold that a plaintiff can offer his own books to show that as there is no entry in them of the payment of his claim, it must therefore be presumed that it has not been paid.

The rule as to the admissibility of the books of either party in evidence, is set out in Greenleaf on Evidence, sections 117 and 118, as follows:

“Section 117. The admission of the party’s own shop-books, in proof of the delivery of goods therein charged, the entries having been made by his clerk, stands upon the same principle, which we are now considering. The books must have been kept for the purpose; and the entries must have been made contemporaneous with the delivery of the goods, and by the person, whose duty it was, for the time being, to make them. In such cases the books are held admissible, as evidence of the delivery of the goods therein charged, where the nature of the subject is such as not to render better evidence attainable.”

“Section 118. In the **United States**, this principle has been carried farther, and extended to **entries made by the party himself**, in his own shop-books. Though this evidence has sometimes been said to be admitted contrary to the rules of the

common law, yet in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it was evidently contemporaneous with the fact, and part of the *res gestae*. Being the act of the party himself, it is received with greater caution; but still it may be seen and weighed by the jury."

The authorities which are quoted by the text writers, show that the books of a plaintiff can only be admitted to prove entries made in them, under certain conditions. **But all authorities agree that the plaintiff's books cannot be admitted to show that no entries appear, and in this way establish his own case.**

A few authorities are submitted.

In the case of **Keim v. Rush**, 5 Watts & Sargent 377 (1843), Supreme Court of Pennsylvania, an action of assumpsit was brought for goods sold and delivered. The defendants offered in evidence their book kept at the rolling mill of all iron delivered there, in which book there were no entries of iron or blooms having been delivered by the plaintiff. The Court rejected the book.

Held (per curiam):

"It is scarce necessary to say the vendees' book was not admissible."

In the case of **Sanborn v. Ins. Co.**, 16 Gray 448 (1860), Supreme Judicial Court of Massachusetts, an action was brought upon an oral contract for fire insurance. Defendant as evidence tending to show that there was no agreement for insurance completed offered in evidence a book kept by the agent in which he entered all risks taken by him for the company, as soon as taken.

Hoar, J.:

"No authority is cited in support of the proposition that the omission to make an entry of a contract in the book kept by one party is evidence, in favor of that party, that no contract was made." . . . "It was clearly inadmissible."

In the case of **Riley v. Boehm**, 167 Mass. 183 (1896), Supreme Judicial Court of Massachusetts, the plaintiff borrowed \$400 from defendant and gave defendant his note for that amount, payable three months from date. Defendant discounted the note at a bank. A few days before it matured, plaintiff claimed he gave the defendant \$400 to take up the note at the bank. The defendant denied this, and testified he regularly made a memorandum in the usual course of business, in a small order and account book he carried with him whenever a customer paid him. **This book was offered in evidence to show it contained no entry of alleged payment.**

Morton, J.:

"Moreover, the book was offered, not as containing an entry relating to the cash in question, but as showing from the absence of an entry that the money was not paid as the plaintiff said that it was. That is, the argument was, that if the defendant had received the money, he would have entered it in the book, and because there was no entry, he did not receive it. This was inadmissible."

In the case of **Scott v. Bailey**, 73 Vt. 49 (1901), Supreme Court of Vermont, the plaintiff sold and delivered flour to the defendant. Defendant admitted the purchase, but claimed he had paid for the flour. Plaintiff's books were admitted to show that there was no entry of the payment.

Watson, J.:

"Subject to the defendant's exception, the plaintiff's account books were admitted in evidence to show that no credit appeared on them of payment for the flour in question. This was admitting the books to prove a negative, which is not permissible; for **such books are not evidence of a negative character to rebut a presumption**, but are evidence only in regard to the proper matters of book account which positively appears upon them as a debt or credit."

In **Lawhorn v. Carter**, 74 Ky. 7 (1874), Kentucky Court of Appeals, an action was brought on a note. So much of plaintiff's books as related to defendant's account with him was allowed to be read to the jury as evidence to show that they contained no entry showing defendant had delivered tobacco to plaintiff (worth more than the debt), as claimed by defendant as a defense.

Held error:

"Mercantile books can only be admitted as affirmative evidence, and are never admissible to establish a negative proposition."

In the case of **Boor v. Moschell**, 8 N. Y. Supp. 583 (1889), the defendant was sued as a member of a firm upon a promissory note alleged to have been made and delivered to plaintiff by defendant's firm to secure \$1000 loaned to said firm by plaintiff. The defendant called as a witness an expert accountant who stated that he had examined the books of the firm with a view to getting at the condition of the accounts, and had made a statement of the moneys drawn from the firm by the plaintiff. The defendant was allowed to put in evidence the book and the statement compiled by the witness from the books. The witness was also

permitted to testify that he could find no mention or entry of this \$1000 advanced "as a note."

Held:

"we are of the opinion that the plaintiff's exception to its admission is fatal to the judgment in this action. The plaintiff's right ought not, and cannot be prejudiced by any entries the defendant's firm may have made, or omitted to have made, in their books. In offering the bill book of the firm in evidence, the defendant's counsel stated he offered it for the purpose of showing that the note in question did not appear on the bill book; and we assume that he argued before the jury, as he stated in his brief on this appeal, that, had the note in question been in existence, it would have been entered in the bill book. The very argument shows the impropriety and incompetency of the evidence as against this plaintiff. The defendant could not charge the plaintiff with entries made without knowledge or assent of the plaintiff; nor could they escape liability by the failure to make the proper entry in memorandum. All such evidence has uniformly been regarded as hearsay in character and should have been rejected by the Court." *Mason v. Wedderspoon*, 43 Hun 20; *Vaughn v. Strong*, 4 N. Y. Supp. 686; *Paine v. Ronan*, 6 N. Y. St. Rep. 420; *Churchman v. Lewis*, 34 N. Y. 444.

In *Schwarze v. Roessler*, 40 Ill. App. 474 (1890), Appellate Court of Illinois, First District, a suit for \$250 was brought. The defendant claimed he had paid plaintiff's deceased partner. To prove non-payment plaintiff put in evidence a firm account book, and one of the original entries kept by deceased, in which the \$250 was charged with no corresponding credit.

Held error:

"The old law was that cash items could not be proved by such books" . . .

"Much less can the absence of entries in such a book be evidence that payments testified to by witnesses were not made. A false entry would be an act of wrong; an omission to enter, might be mere negligence or forgetfulness, with no motive, good or bad."

"The admission of the book was error."

In **Winder v. Pollack**, 151 N. Y. Supp. 870 (1915), N. Y. Supreme Court, Appellate Term, 1st Dist., which was an action for goods sold and alleged to have been delivered, which delivery was denied, it was held:

"To resist the claim of delivery of the twenty-four coats the Court permitted the defendant to introduce in evidence his books of account to show the negative fact that they contained no entry of the receipt of the coats, and his bookkeeper was permitted to testify that the books contained no such entry. Obviously, this was error."

In considering this question aside from the authorities, we are at once struck by the fact that if the plaintiff keeps books, but puts nothing in them in regard to a stale claim, he may be able to escape the penalty of his delay by means of what may be an additional act of negligence. If the presumption of payment can be rebutted in this way, it destroys its value. The creditor would carry in his own hands, the means of destroying a presumption which the law has found necessary to protect debtors. The debtor could do nothing to contradict the negative evidence of the creditor's books, for he would probably be in the position the law assumes him to be in after this long lapse of time; without evidence of the transaction. It could never have been the intention of the courts to destroy in this way the effect of a presumption that is looked upon with favor. A plaintiff is never allowed to manufacture self-serving evidence that would pro-

tect him from his own neglect. A man who would delay twenty years in presenting his claim would be the man who would also neglect to enter in his books the payment if it had been made. **It would enable one act of negligence to be cured by another, and allow the presumption of payment to be defeated by another presumption; that the plaintiff would have entered the payment if the claim had been paid.** To permit this, would seem like a travesty upon justice. If this non-appearance of any entry could be construed as an act against the plaintiff's interest, and, therefore, evidence against them, it might have some force; but such is not the case. It is a self-serving piece of evidence, which is without merit or weight.

III. ARE THE REPORTS ADMISSIBLE FOR ANY PURPOSE?

If for any reason it should be held that the plaintiff's reports were admissible for the **purpose of proving no entries**, it must next be considered whether the reports themselves were of such a character as justified their admission for any purpose.

Henry C. Pearson, a witness called by the Government, testified (R., pp. 200 to 257) that he had examined certain reports belonging to the United States, and did not find in them any reference to these dividends having been paid to the date suit was brought. The books referred to were Exhibit No. 91 and Exhibits 78 to 86. Exhibit No. 91 was a book made by posting the entries from Exhibits 78 to 86; this posting into Exhibit No. 91 had been done in part by the witness (R., pp. 229, 247, 248, 249, 250). The value of Exhibit No. 91, in which the witness said the entry of any dividend should have been made, if they had been paid by the Canal Company, was dependent, therefore, entirely upon those books from which Exhibit No. 91 was posted,

namely, Exhibits 78 to 86. These latter books were made up by binding together reports made at different times by the Chief of the Division of Bookkeeping and Warrants, and sent by the Chief of that Division to the Secretary of the Treasury. In order to understand the inadmissibility of this evidence for any purpose, it is necessary to examine into the method by means of which the dividends of the Canal Company were paid to the United States Government. The witness, Pearson, did not know in what way, or to whom, the dividends were paid by the Canal Company, but stated that if the dividends were paid to the sub-treasurer, in Philadelphia, the latter would send copies of his account or books to the First Auditor of the Treasury. This department was in no way shown to be connected with the preparation of the exhibits which were offered in evidence (see R., pp. 256-257). How the fourteen dividends which had been declared prior to 1873 by the Chesapeake and Delaware Canal Company were paid to the United States is shown by the testimony of Michael J. O'Reilly (R., pp. 165 to 173). He testified that dividends were paid by the Canal Company since 1868 amounting annually to over \$42,000. That all of these dividends had been paid by the Canal Company to the Assistant United States Treasurer, in Philadelphia, a Mr. Eyster. That he entered their payment in his books, and sent a transcript of his daily sheet, together with a certificate of deposit to the division of the Treasury known as the Division of Public Moneys. This division made the daily transcript and certificates of deposit sent from Philadelphia the basis of a list known as a Deposit List, which was sent to the Division of Bookkeeping and Warrants. This latter division, from the information thus received, made a report to the Secretary of the Treasury, and his Registration Office compiled the reports thus made and had them bound into the books which were offered in evidence in this

case, Exhibits 78 to 86. The books of original entry were to be found in the custody of the Assistant Treasurer in Philadelphia. Exhibits 78 to 86 (from which Exhibit 91 was taken), were therefore reports entirely based upon the reports sent to the Division of Book-keeping and Warrants from the Division of Public Moneys, the latter department basing the reports so made upon reports received from Philadelphia.

These books were not books of original entry, nor were they in any sense copies of public books or records which when certified under the certificate of the proper officer are evidence. They depended for their accuracy upon the comparisons made in different places through which the information passed, and did not pretend to be even certified copies of the original copies. Such books do not prove themselves, and without a certificate from some one that they are correct copies of the original entries they are of no value as evidence and their contents cannot be proved by a witness who had no part in making them. The books and records of the United States are evidence when they are books of original entry; if not books of original entry they are admissible only when they are properly certified copies of public books or original records.

The Government was bound if it wished to show that it had no record of the payment of this claim to offer the best evidence that it had of this fact.

If the books of account of the United States Government are evidence, either of entries that were made in them or of the fact that entries were not in them, the Government must of necessity produce those books in which the payments were entered in the regular course of business or certified copies of the account kept with the defendant showing the entries of the various dividends that had been paid in the past. There is no dispute that the payment of these dividends if made would have been made at the sub-treas-

ury in Philadelphia; if any books were evidence they must have been the books from Philadelphia. It was there that all the dividends to the United States had been paid for fourteen years prior to '73, and these books were the ones that would have shown what payment, if any, was made. Plaintiff produced a witness who had examined reports not even made up from reports sent by Mr. Eyster, the sub-treasurer in Philadelphia, but made by a department who took them from the reports of **another department**, to which department Mr. Eyster sent the transcripts of his books of original entry. Well might a jurymen ask at the trial of this cause, "If you are offering the United States account books, can you offer the latter and not show the entries from which that ledger was posted?" (R., pp. 248-249.) It was testified that these reports contained no entry of the payment of any dividends, and from this fact the jury was asked to find, not only that dividends had not been paid, but that no entry had been made of their payment in the books of original entry in Philadelphia. No explanation was given why the sub-treasury books were not produced and for aught we know they may contain the entries of the payments of these dividends. The testimony of Pearson founded solely upon these reports was clearly inadmissible.

Authorities.

The learned trial Judge in admitting the uncertified copies of reports and the evidence of the witness in regard to them (Assignments of Error, Nos. 2 to 13 inclusive), cited as his authority (Record, p. 241), the case of "**Holt**" v. "**United States**," 218 U. S. 245, and another case the name of which was not given. An examination of the former case shows that it was a criminal proceeding and the question was as to the

evidence necessary to establish the place where the murder had been committed, the Court stating:

"Several objections were taken to the admission and sufficiency of evidence. The first is merely an attempt to raise technical difficulties about a fact which no one really doubts, namely, that the band barracks, the undisputed place of the crime, were within the exclusive jurisdiction of the United States. A witness testified that they were within the inclosure of Fort Worden under military guard and control, from which all unauthorized persons are excluded, and that he knew that the fence was coincident with the boundaries shown on a map objected to but admitted. He identified the band barracks as described in certain condemnation proceedings. The State of Washington had assented by statute to such proceedings and Congress had authorized them. The deeds and condemnation under which the United States claimed title were introduced. The witness relied in part upon the correctness of official maps in the Engineers' Department made from original surveys under the authority of the War Department, but not with his personal knowledge, and he referred to a book showing the titles to Fort Worden compiled under the same authority. The documents referred to are not before us, but they properly were introduced, and so far as we can see justified the finding of the jury, even if the evidence of the de facto exercise of exclusive jurisdiction was not enough, or if the United States was called on to try title in a murder case. We think it unnecessary to discuss this objection in greater detail."

It will be seen from the language of this opinion that the **original deeds** and condemnation proceedings and the official maps in the Engineers' Department taken from original surveys were introduced. If these papers were **original documents** they were of course admissible and if they were copies we are **not** to pre-

sume that they were not properly authenticated by the certificate of the proper officer. We must, however, make this unwarranted assumption to hold this case an authority for the introduction of the unauthenticated copies in the present case.

The following cases not only answer what has been said by the learned trial Judge, but they also substantiate the authorities already quoted; that the nonentry of the payment of the dividends in the books of the United States is but a self-serving declaration of a negative character, and inadmissible evidence to rebut the presumption of payment.

In **Marks v. Orth**, 121 Ind. 10; 22 N. E. 668 (1889), a suit was brought on a promissory note. It became material to prove the whereabouts of a Mr. Orth, the deceased maker of the note, at the time the note matured. To establish this, a document was offered which purported to be the report of the Paraguayan Investigation, of which Mr. Orth was a member, and which showed that he was present with the committee at its sittings at the time in question. The document was admitted and its admission assigned as error. The Supreme Court of Indiana said:

“The document, as it appears in the record, is in book form, unbound, containing 364 pages. The only proof or identification of it is what appears in the book itself, upon the first page. It is entitled as follows: ‘41 Congress, 2nd Session. House of Representatives. Report No. 65. Paraguayan Investigation. May 5th, 1876. Ordered to be printed, and recommitted to the committee on foreign affairs. Mr. Orth, from the committee on foreign affairs, made the following report.’ The question is presented as to the admissibility of this document, pamphlet, or book in evidence. It purports to be a printed copy of a report of a subcommittee of the house of representatives, but it is in no way authenticated. It is not certified

to by any officer. It is not identified by any testimony. It is not even identified by the journal of the House, nor does it purport to be incorporated in or a part of the authenticated journal. We are not cited by counsel to any authority holding such a document as this, coming to the court in the manner this is presented, as competent evidence. It is not even a publication required to be made or a record required to be kept by the house of representatives. It is not such a document as is entitled to admission, and under no rule of law is it admissible, and the Court erred in admitting it in evidence. *I Whart. Ev.*, sections 637, 638; *Filler v. Shotwell*, 7 Watts & S. 14; *Brown v. Hicks*, 1 Ark. 232; *Hail v. Palmer*, 5 Mo. 403. For this error the judgment must be reversed. . . ."

This case closely resembles the case at bar.

In the case of **U. S. v. Pinson**, 102 U. S. 548 (1880), the Supreme Court review section 886 of the Revised Statutes, and conclusively establish that transcripts from the books of the Treasury **when properly certified** can be admitted, but the transcripts must be copies of the original records and the certified correctness of the copy is absolutely essential. The Court said (p. 552):

"It will be observed that section 886 refers to 'transcripts from the books and proceedings of the Treasury Department,' as well as to 'copies of bonds, contracts, or other papers relating to or connected with the settlement of any account between the United States and an individual.' The former, certified and authenticated as required by the statute, 'shall be admitted as evidence,' while the latter, certified and authenticated in like manner 'may be annexed to such transcript,' and have 'equal validity, and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court.' Commenting upon similar language in the Act of May 3, 1817, this court, in *Smith v. United States*

(5 Pet. 300), which was a suit against a paymaster in the army for a balance alleged to be due to the Government, said, that under the head of 'a transcript from the books and proceedings of the Treasury Department' were included 'charges of money advanced or paid by the department to the agent, and claims suspended, rejected, or placed to his credit.' These all appear, said the Court, upon the 'books' of the department; and the decision on the vouchers exhibited, and the statement of the amount due, constitute, in part, the 'proceedings' of the treasury. The court, in that case, recognizes the transcript from the books and proceedings of the department as a document which shows the account of the Government debtor, as finally adjusted by the proper officers, and as it appears upon the records of the department. Such adjusted accounts, says Mr. Chief Justice Taney, necessarily show the charges against as well as the credits of the disbursing officer. They 'could not,' said he, 'be adjusted on the books in any other manner, and the transcript, or, in other words the copy of the entire account, as it stands on the books (which must include debits as well as credits), are made evidence by the law.' Nor do we see any reason for restricting the words of the Act of Congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the Government and the individual. They are records of the proper departments, and are always open to inspection of the party interested. *Bruce v. United States*, 17 How. 437.

"Unless, therefore, the transcript offered, as evidence, upon the trial below is certified by the proper officer, and authenticated under the department seal, to be 'a transcript from the books and proceedings of the Treasury Department,' it is not such a transcript as the statute makes evidence.

"We are of opinion that the transcript offered is not certified and authenticated to be of that character which the statute declares shall be admitted as, in itself, evidence."

In the case of the **Town of Darlington v. Atlantic Trust Co.**, 68 Fed. 849 (1895), the municipal corporation offered its own books to show that an issue of bonds exceeded the constitutional limitation. The Court of Appeals in approving the action of the lower Court refusing to admit these books, said (p. 853):

“It further appears that, pending the trial, the defendant below, during the examination of a witness, who had testified that he was the custodian and bookkeeper of the town of Darlington, and who then had its official account books before him, asked said witness to state from such books the amount of the outstanding bonded indebtedness of said town during the month of April, 1890, and that on objection of the plaintiff below the Court refused to permit such question to be answered: that defendant below then offered to prove by the same witness that the books before him were the official account books of the town of Darlington, in his custody as the clerk of said town, and that the same either in his handwriting or in the handwriting of his predecessor in office, and then to show from the same the amount of such indebtedness of said town in January and in April, 1890, which testimony so offered was also refused by the Court, and the refusal is now assigned as error. The books so offered were not public records in any such sense as to make their contents evidence. There was no effort made to verify the entries, nor to lay the foundation required to authorize the witness to testify as to the entries not made by him. The party making part of the record was not produced, nor was his absence accounted for. It does not appear what part of the entries in the books were made by the witness, nor when they were made, whether before or after the institution of this suit, nor whether they were made with direct reference to the defense of the same. Again, so far as the record discloses, the entries offered and excluded may have been entirely of the character that cannot be given in evidence by the party in whose

behalf they were made. It is well established that a private entry in the books of a municipal corporation will fall within the rule applicable to private books, and cannot be given in evidence by the party by whose direction it was made. Dill. Mun. Corp. (4th Ed.) Sec. 304, note: 15 Am. & Eng. Enc. Law, 1076."

In the case of **Board of Commissions of Lake County v. Keene Five-Cents Saving Bank**, 108 Fed. 505 (1901), the Circuit Court of Appeals, Eighth Circuit, define the law applicable to the case at bar. This case was a suit on fifteen funding bonds of the county of Lake. Out of the total issue, bonds, to the amount of \$75,000 had been issued to the firm of Chase & Taylor and the bonds in suit were a part of this number. The defense was that the bonds were issued in exchange for county warrants which evidenced debts incurred after the constitutional limitation of indebtedness of the county had been exceeded. For the purpose of showing what warrants were exchanged for the bonds in issue, the county offered in evidence certified copies of three lists or statements of warrants written on the letter heads of Chase & Taylor. The county clerk, who certified the copies, testified that he had no knowledge of the original transactions, but that when he entered upon the duties of his office, he found deposited there the originals of the three statements wrapped up with county warrants which corresponded in number, date, and amount with the figures in the statements. The warrants so found were offered in evidence with the statements but both were excluded. It will be noted that the copies were here certified by the custodian of the originals whereas in the case at bar there was no such certificate. The Court said (p. 508):

"Neither of these lists bore any signature or date, and no witness came to testify when, why

or by whom they were made. It is earnestly contended that the rulings of the court below that this evidence was incompetent to prove the fact that any of these warrants were exchanged for any of the bonds in issue was a fatal error. But the established rules of evidence which control the trial of an issue of fact between adverse litigants are not suspended or abrogated when one of the parties to the action is a county or a municipality. Hearsay and self-serving declaration are as pernicious and incompetent to establish a claim or a defense of a county as they are to prove a cause of action or a defense of an individual. If the issue of the exchange of these warrants for these bonds had been on trial between private parties, the defendant certainly could not have established the exchange by proof either that he had himself said or written, or that Chase & Taylor or any other person had said or written, that such an exchange had been made. The former statement would have been a mere self-serving declaration, and the latter the baldest hearsay. The plaintiff would have been entitled upon such an issue to the testimony, under oath, of the witnesses who knew the facts, and to an opportunity to cross-examine them, and in the absence of such evidence the defendant would surely have failed. These rules are equally applicable to the trial of such an issue between a private individual and a county, in the absence of any modification or abrogation thereof by Act of Congress or of the Legislature. The officers of a county are its agents. Their acts and statements in the discharge of their official duties are the acts and statements of the county, and not those of its adversaries. Upon a simple issue of fact like that in hand, such acts and statements may sometimes be used in evidence against the county as its admissions against interest; but, when offered by the quasi municipality, they are as much self-serving declarations and as incompetent as the prior oral or written statements of an individual in support of his claim or defense, unless they are made competent by some express

statute, or unless they fall under the recognized exception applicable to 'official registers or books kept by persons in public office, in which they are required by statute or by the nature of their office to write down particular transactions occurring in the course of their public duties and under their personal observation.' "

The cases defining the character of public documents which may be admitted in evidence show that the reports offered in the present case are not admissible as public documents or shown to be such.

In *Sturla v. Freccia*, 5 App. Cases 623, England, 1880, House of Lords, a report was made by certain persons called the Giunta di Marina, at Genoa, and was offered in evidence for the purpose of proving certain facts about a Mr. Mangini, who had been consul in London for about ten years, and desired to be advanced to a somewhat higher authority, as agent of the republic. The public authority at Genoa seems to have had the practice of referring all applications to a species of executive subcommittee, which was called the Giunta di Marina, the duties of which were to learn what could be known about the fitness of the person who made the application and report the result to the body with whom the appointment rested.

Lord Blackburn:

"I understand a public document to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial or quasi judicial duty to inquire . . . but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it be given access to it afterwards."

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"Taking that view of the matter, I think it becomes clear that this document is not evidence. Supposing this inquiry had been carried on under the authority of the English Crown, and the English Crown had required of a magistrate that some confidential report should be made, it would not be public in one sense; but it would be public in this sense, that it would concern the Crown, and, from common respect for the Crown, one would suppose that what the magistrates told the Queen would be what they firmly believed and considered they had good reasons for believing, but I do not think it would come within the sense and meaning of the rule that a public document would be admissible as evidence on the ground that a public officer, in making the statement for the public, was likely to speak, and must be presumed *prima facie*, to have known and spoken the truth. I am not aware of any decision which says that, in such a case as I have supposed the document would be received."

In **Mercer v. Dunne**, 2 Chancery 534 (1904), Chancery Division Supreme Court of Judicature, there was a dispute over rights to a beach.

Jenkins, K. C., tendered various ancient maps and plans which were prepared by the direction of the Board of Ordinance in 1641 and 1644 and 1647, alleging that all were public documents and admissible as evidence of reputation and asked the Court to infer that the Board of Ordinance, which was the War Office of that time, would employ competent people to make plans for them.

Farwell, J.:

"they are not public documents"
 "but the chief ground for not admitting them is that I think it would be most dangerous to admit confidential reports made to the public War Office or to the Board of Ordinance, as evidence of public rights. . . ."

In **Hegler v. Faulkner**, 153 U. S. 109 (1893), the plaintiff brought an action against the defendant to recover land which defendant had acquired from the grantees of one George Washington, a half-breed Indian, to whom the land had been originally allotted. Plaintiff also claimed through George Washington, and to show George Washington was of age when he made his deed to plaintiff's ancestor in title, plaintiff offered in evidence, a list bearing the heading: "Office of Indian Affairs," the date, February 4, 1858; and containing the name, sex, age, degree of blood, and tribe of certain Indians. Plaintiff also offered in evidence a letter from the Commissioner of Indian Affairs to Joseph L. Sharp, directing him to prepare said list, in order to comply with provisions of Act of Congress, directing allotments to Indians.

Held (Justice Shiras):

"Our conclusion is that the Court below did not err in excluding the list offered. It was not an official record intended as a mode of preserving the recollection of facts."

In **Cushing v. Nantasket Beach Railroad**, 143 Mass. 77 (1886), Supreme Judicial Court of Massachusetts, respondent excepted to exclusion of a printed document entitled "48 Congress; 1st Session; Senate Ex. Doc. No. 74." The Secretary of War on January 24, 1887, transmitted to the Senate a letter from the Chief of Engineers, submitting copies of reports made by Major Raymond of the Corps of Engineers in 1882 and 1883, and this letter with the accompanying papers, when received by the Senate, was referred to the Committee on Commerce and ordered to be printed. This printed document was offered in evidence by the respondent for the purpose of showing from the reports of Major Raymond, that the road-bed of the company protected the

remaining land of the petitioner from being washed away by the sea, and that a special benefit was thus received from the location of the railroad, which should be considered in estimating the damages.

Held (Field, J.):

"The acts of Major Raymond and Assistant Engineer Bothfield, in surveying the headland in the town of Hull, cannot be called acts of State, nor are the facts stated in the reports public facts in the sense that they are facts which the United States have, **under authority of law, undertaken to ascertain and make public for the benefit of all persons who may be interested in them.**"

Under these authorities the reports admitted in this case were not shown to have any of the incidents of public documents: they are not the books of original entry, and therefore were inadmissible for any purpose.

IV. THE DEFENSE OF THE PLAINTIFF IN ERROR.

The Government relies entirely upon the testimony of Wilson and the reports showing no entry of payment: to rebut the presumption that has arisen against the claim that is presented in this suit. If the contention of the plaintiff in error be correct, neither the testimony of Wilson nor the reports should have been admitted for the purpose for which they were offered, and therefore the Government **have produced no evidence** to rebut the presumption of payment. If this evidence was admissible, the strength of the presumption must be considered, as the Canal Company rest their defence entirely upon the presumption of payment which arises from two facts:

1. The unexplained delay of the Government for over thirty-five years in making demand for payment.
2. The failure of the Government to show that their claim was unpaid during the twenty years prior to bringing suit.

What Is the Effect of the Unexplained Delay of Over Thirty-eight Years in Making Demand for Payment of the First Dividend, and Over Thirty-five Years' Delay in Making Demand for the Payment of the Last Dividend?

The trial Judge stated as follows (R., pp. 269 and 270, Assignment of Error No. 15, p. 14):

"If the United States shows non-payment, it is sufficient. It is not necessary to show that the United States was hindered or prevented from suing earlier. Nor is it necessary to show that the officers of the United States were justified in waiting so long before bringing this suit or to explain just why suit was not brought earlier. The rule requiring proof beyond a reasonable doubt has no application to this case. Mere carelessness or negligence on the part of the officials of the United States in omitting earlier to institute proceedings for the collection of the dividends in question cannot, aside from the shifting of the burden of proof from the defendant to the United States as above mentioned, in any manner or to any extent constitute a defense to the claim made by the United States in this action, or injuriously affect the United States in its prosecution. Such is the settled law, and you are, therefore, instructed, if the United States has shown non-payment of the dividends, not to permit any idea or suggestion of mere laches, whether consisting of negligence or carelessness on the part of the officers or employees or agents of the United States in not sooner causing this action to be instituted, or in not earlier ascertaining or discovering the fact that the dividends in question had been declared in favor of

the United States, in any manner to influence your action as jurors in reaching a verdict in this case. See also Assignment of Error No. 13 on page 12.

The Court of Appeals in passing upon the same subject, say in part (R., p. 374):

"And, even if we assume that a private suitor might be obliged to explain or excuse his prolonged failure to sue, this merely requires him to account for his laches or negligence, and, as the sovereign is not bound by the laches of his agents, he cannot be compelled to explain a neglect that he may wholly disregard. But in the case of a private suitor also we think the defendant's contention is not sound."

Is it not a contradiction for the trial Court to say "that it is not necessary . . . to explain just why suit was not brought earlier," and yet to say that the United States is subject to the presumption of payment?

The presumption of payment is a rule of evidence that is created by the unexplained delay of twenty years in instituting suit, and when this delay is unexplained the presumption has arisen and must be answered before the Government or the individual can recover.

The Court of Appeals agrees with the trial Court, as it says otherwise it would be making the United States bound by the laches of its agents. This is a case where the Government may lose its ability to prove its rights by reason of the neglect of its officers and it cannot escape this result, if the trial of the facts is to be conducted under the legal procedure of our courts.

The lower courts have confused the Statute of Limitations with the presumption of payment. It may be true that the sovereign cannot be deprived of his remedy by reason of the lapse of time. But a Government official may, by his negligence in presenting the claim of the Government, prevent that Government,

even when acting in its sovereign capacity, from establishing its case with sufficient certainty to satisfy the trial Court, and this certainty cannot be reached, when the presumption of payment has arisen, unless the delay has been satisfactorily explained. The authorities quoted in this brief show that unexplained delay of twenty years is a bar unless there has been what is tantamount, to an admission within twenty years before suit, that the debt remains unpaid.

It has also been repeatedly held that if the Government comes down from its high position of sovereign and goes into business or commerce it has no higher rights than those possessed by any individual engaged in the same business, and this doctrine is applicable to the case at bar.

The Government became a stockholder of the defendant below and as a stockholder has no higher rights than any other stockholder. The Government came down from its position of sovereignty and entered the domain of commerce and its right under such circumstances cannot be better put than by quoting from the case of **Cooke, et al., v. United States**, 91 U. S. Reports, 396 (1875) in which this Court say:

“It was conceded in the argument, that, when the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances. This is in accordance with the decisions of this court. The *Floyd Acceptances*, 7 Wall. 666; *United States v. Bk. of Metropolis*, 15 Pet. 377. As was well said in the last case, ‘From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be in maintaining these principles.’

“Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion. *United States v. Kilpatrick*, 9 Wheat. 735; *Gibbons v. United States*, 8 Wall. 269. Still

a government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and, if it fails in this, its claim upon the parties is lost. *United States v. Barker*, 12 Wheat. 559. Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world."

Under this line of decisions, of which the one quoted is typical, there would seem to be but one question open: **When the United States becomes a stockholder in a corporation, has it entered "the domain of commerce"?** It is submitted that by the holding of stock, the Government becomes a partner in a business with the other stockholders with a limited liability, and has no higher rights and privileges than those with whom they are associated. The many decisions which hold that the Government imparts none of its prerogatives to the stock that it holds, are set out in the opinion of the lower Court when sustaining the demurrer to the plea of the Statute of Limitations (R., pp. 18, 19, 20 and 21). If the Government can confer no rights upon the stock it holds, it must of necessity be confined to the

rights which are vested in the stock itself, and those rights are the same for every other holder of stock in the same corporation. If every stockholder must demand his dividends upon his stock within thirty-five years, or he will lose his right to them, this must be true of all the shareholders, no matter who they may be.

But whether the Government is acting in its sovereign capacity or has come into commercial life the courts hold when it presents its claim which on its face is over twenty years old, a rebuttable presumption has arisen that this claim is paid, and unless this delay is explained or the presumption which has been created by it, answered, there can be no recovery. It might also be well said that if the Government claims that they are excused in this delay as it was due to the negligence of their agents, this excuse, if excuse it is, must be substantiated by evidence, and this the plaintiff below has entirely failed to do, nothing has been offered upon the subject.

To sum up this whole matter, under the authorities

If the Government has failed to explain the delay of over thirty-five years in making demand for these dividends, or has not shown non-payment within twenty years, the presumption of payment becomes a bar to any rights of recovery, and this is true whether the Government is acting in its sovereign capacity or has stepped down from that position?

In the case of **Philippi v. Philippe**, 115 U. S. 151 (1884), in which suit was brought to recover a claim after the expiration of thirty-eight years, this Court said as follows (p. 159):

"It is well settled by the decisions of the Supreme Court of Alabama, that even in the absence of a statute of limitations, if twenty years are allowed to elapse from the time at which proceedings could have been instituted for the settle-

ment of a trust without the commencement of such proceedings, and there has been no recognition or admission within that period of the trust as continuing and undischarged, a presumption of settlement would arise operating as a positive bar. *Rhodes v. Turner*, 21 Ala. 210; *Blackwell v. Blackwell*, 33 Ala. 57; *Worley v. High*, 40 Ala. 171; *Ragland v. Morton*, 41 Ala. 344; *Harrison v. Heflin*, 54 Ala. 552; *Greenlees v. Greenlees*, 62 Ala. 330; *McCarty v. McCarty*, 74 Ala. 546.

"The same general rule has been laid down by this and other courts as the settled law of equity jurisprudence. *Elmendorf v. Taylor*, 10 Wheat. 152; *Bowman v. Wathen*, 1 How. 189; *Wagner v. Baird*, 7 How. 233; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Hovenden v. Annesley*, 2 Sch. and Lef. 607, 636; *Cholmondeley v. Clinton*, 2 Jac. and Walk. 1, 138. These authorities are pertinent and conclusive of the present case."

If the Government is bound by the same rules as an individual, this case and the cases quoted would appear to be conclusive of the case at bar.

In *Bowman, et al., v. Wathen, et al.*, 1 Howard 189 (1843), one of the cases cited above, the Court said (p. 193):

"In a case very often referred to, *Hovenden v. Lord Annesley*, 2 Sch. & Lef., Lord Redesdale (p. 636) lays it down as what he calls the common law of courts of equity, 'that every new right of action in equity that accrues to a party, whatever it may be, must be acted upon, at the utmost, within twenty years.' *Herey v. Dinwoody*, 4 Bro. Ch. Rep. 257, was a case wherein the statute of limitations could not directly apply, for there had been a decree for an account that had not been proceeded in with effect; it was a case, therefore, in which the Court proceeded according to its discretion, and not by any analogy with the statute of limitations; Lord Alvanley, in deciding this case, puts it upon the ground of public policy, and would not permit the account to be carried on, because the party who would otherwise have been entitled to it, had been

guilty of such laches as to render it impossible to settle the account accurately. In the case already mentioned of *Hovenden v. Lord Annesley*, Lord Redesdale strikingly illustrates the force and inflexibility of the principle on which he had been insisting, when he adverts to and disallows the circumstances adduced and relied on to modify the operation of that principle. After declaring that lapse of time, independently of the statute, would conclude the party in default, he proceeds to remark, that **'it never can be a sound discretion in the court to give relief to a person who has slept upon his rights for such a lapse of time;** for though it is said, and truly, that the plaintiffs in this suit and those under whom they claim were persons embarrassed by the frauds of others, yet the court cannot act upon such circumstances. If it did, there would be an end of all limitation of actions in the cases of distressed persons; for if relief might be given after twenty years on the ground of distress, so might it after thirty, forty, or fifty; there would be no limitation whatever, and property would be thrown into confusion.' So Sir William Grant, in the case of *Beckford and others v. Wade*, 17 Ves. 87, declares that 'courts of equity by their own rules, independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation, for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand.'

"This doctrine of an equitable bar by lapse of time, so distinctly announced by the chancellors of England and Ireland, has been ruled with equal force by this tribunal in the cases of *Prevost v. Gratz*, 6 Wheat. 481; of *Hughes v. Edwards*, 9 Wheat. 489; of *Miller's Heirs v. McIntyre*, 6 Pet. 61; and of *Piatt v. Vattier, et al.*, 9 Pet. 405. It should now be regarded as settled at law in this court."

In *Wagner, et al., v. Baird, et al.*, 7 Howard 234 (1849), (one of the cases cited above), (Appeal from

the United States Circuit Court for the District of Ohio), which was a bill filed to enforce a claim between thirty-five and forty years after it was due, this Court said as follows (p. 258):

"A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights. 'Nothing', says Lord Camden (4 Bro. Ch. R. 640) 'can call forth this court into activity but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive, and does nothing.' Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. The party guilty of such laches cannot screen his title from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability." (P. 259):

"This doctrine has been so often asserted by this court, that it is unnecessary to vindicate it by argument. It will be sufficient to refer to Platt v. Vattier, 9 Pet. 405, a case much resembling the present, and Bowman v. Wathen, 1 How. 189."

The cases are uniform in stating that after twenty years of quiescence a claim in the eyes of the law is paid, unless some reason is shown **why the plaintiff did nothing during that period.** The mere assertion by the plaintiff either by word of mouth, or by reference to his books that the claim was due during the whole period is not an answer, it is an aggravation. If the plaintiff's books have shown that the claim was due, why was no demand made for payment? The question

must be answered, be the plaintiff a government or an individuals. The lapse of twenty years writes a receipt upon the claim, and unless that receipt is explained or contradicted, there is nothing for the jury to pass upon.

Courts have given various reasons that might be shown to account for the delay in making demand, but **no Court has neld that no explanation is necessary.** One can hardly conceive of an individual suitor coming into court with a request for judgment and stating that he did not propose explaining why he had made no demand for the payment of his claim for over thirty-five years and that he would not inform the Court or the jury why he had waited before presenting his demand until all those who knew of the transaction were dead. There could be but one result to such a position if taken by an individual. It would throw so much doubt upon his claim he would never be allowed to recover. The Government under the ruling of this Court must be treated in a similar manner.

Some of the reasons that may be given to rebut the presumption of payment that arises after twenty years have been stated by Lord Chancellor Erskine, in the case of **Hillary v. Waller**, 12 Ves. Jr. 239 (1806), where he said (p. 265):

"The presumption in courts of law from length of time stands upon a clear principle; built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this; that a man will naturally enjoy what belongs to him. That is the whole principle. . . .

"Then, as to presumption of title: First, as to a bond taken; and no interest paid for twenty years; nay, within twenty years; as Lord Mansfield has said: but upon twenty years the presumption is, that it has been paid; and the presumption will hold; if not repelled; unless insolvency, or a state approaching it, can be shown; or, that the

party was a near relation; or the absence of the party, having the right to the money; or something, that repels the presumption, that a man is always ready to enjoy what is his own. The case of a mortgage is an instance. I remember a case before Lord Mansfield, where a mortgagee brought his ejectment; the deeds proved, accompanied with a bond, all went for nothing; he had not received for twenty-five years, though living within a street of the mortgagor, any money upon the mortgage; and upon that the mortgage was considered satisfied. It has been said, you cannot presume, unless you believe. It is, because there are no means of creating belief or disbelief, that such general presumptions are raised, upon subjects, of which there is no record or written muniment. Therefore upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, instead of belief, which must be the foundation of the judgment upon a recent transaction, where the circumstances are incapable of forming anything like belief, the legal presumption holds the place of particular and individual belief."

In the **Claim of Reside**, 9 Op. Atty. Gen. 197 (1858), the United States attempted to set off against a judgment it owed to Reside's estate, the amount of certain drafts on which it claimed that Reside was still indebted to the Government. The drafts had been made twenty-three years before. In the opinion which Judge Black gave he puts the reason for the presumption of payment from lapse of time with great clearness. He said (p. 204):

"If all these considerations could be set aside, the lapse of time alone would determine the case in favor of Reside's estate. It is a decisive answer to say that the claim is based on transactions which are twenty-three years old. It is a rule of common sense and reason, as well as law, that when a party has lain by with a claim until the evidence concerning it has ceased to exist, and

then produces it, the other party is not bound to explain it. It is presumed that he could explain it if his witnesses were alive and his papers preserved, and that presumption shall stand in place of all the proof which might have been demanded when the matter was fresh. I admit that the statute of limitations cannot be pleaded against the Government as a technical bar. I do not speak of that conclusive **legal** presumption which would be created in six years against an individual. But the Government is bound, like anybody else, by the rules of evidence and by the **natural** presumption arising from the facts of the case. In some countries there are no statutes of limitation; in all countries there are large classes of cases to which such statutes do not apply. But it is one of the rules of every civilized code that a certain length of time, generally about twenty years, shall be regarded as evidence that a claim is either unjust or satisfied, **and such lapse of time proves that fact as fully as if it had been attested by credible witnesses.** The experience of all mankind has shown that the evidence thus furnished by time is true and reliable. The judge who disregards it would decide against the original honesty of the case ninety-nine times in a hundred.

"There is no such impeccability ascribed to a government as will give it a right to deny the evidence. When time testifies against the sovereign it is heard with as much respect as any other witness would be.

"This is the rule which must be applied to every stale claim, even when it seems to have been clear and free from dispute at first. But where it was originally doubtful and obscure the presumption which time raises against it is a thousand-fold stronger, and stronger still where the obscurity was produced by the fault of the party setting up the claim."

In **Cope v. Humphreys, et al.**, 14 S. & R. 15 (Pa. 1826), which was a suit on a judgment—the Court said (p. 21):

"This brings us to the second head of inquiry,—If the delay to prosecute the judgment for more than twenty years has not been accounted for, or any evidence given from circumstances to be left to a jury, from which they might account for the forbearance, was it the duty of the court to submit it as an open question for the belief of the jury, as to the actual payment? On this subject, I need only refer to the opinion of Judge Gibson in *Henderson v. Lewis*, 9 Serg. & Rawle 379: 'The rule is in the nature of a statute of limitation, furnishing indeed not a legal bar, but a presumption of facts, and, although not conclusive, yet **prima facie** evidence of it; and therefore sufficient of itself to cast the burden of countervailing proof on the opposite party. Where less than twenty years have intervened, no legal presumption arises; and the case not being within the rule, is determined on all its circumstances; among which, the actual lapse of time, as it is of greater or less extent, will have a greater or less operation; and then it is a matter exclusively for the consideration of the jury. But where the legal presumption arises, it would, besides rendering its application in most cases difficult and uncertain, change its very nature and destroy all analogy to the statute of limitations, from which it is derived. The presumption is not subject to the discretion of a jury; they are bound, where it operates at all, to adopt it as satisfactory proof till the contrary appears.'

"Now, taking the whole charge of the presiding Judge together, as it ought fairly to be taken, the court did so charge. If there had been any circumstances, any thing but the lapse of time to charge the jury on, that should have been left to the jury; but where there was none, the presumption of law on that fact is, that the judgment was satisfied. The court did no more, and, if they had done less, they would have committed an error. **On the twenty years unexplained, there was nothing to leave to the jury; they had had no belief to exercise on it; it is because there are no means of belief or disbelief, the presumption of the fact**

arises; the presumption holds the place of particular and individual belief. It prevails, because the presumption of law is, that the obligor or conuzor in that long time has lost its receipts and vouchers, or the witnesses who could prove the payment might be dead. **The jury might not have believed, this court might not believe the fact of payment; but that specific belief is not necessary.** For wise purposes the law has raised the general presumption. The laying down any other rule would be destroying all legal presumption. The position of the court below is justified by the opinion of all the judges in England, as in *Grantwicke v. Simpson*, 2 Atk. 144, it is said '**that the Judges have bound it down, as an irreversible rule, that if there be no demand for money due on a bond for twenty years, they will direct a jury to find it satisfied, from the presumption arising from length of time.**' "

In *Stover & Barnes v. Duren*, 3 Strob. 448 (S. C. 1849), suit was brought on a judgment twenty-six years after it had been entered. It was held that an admission of the debt within the period was not strong enough to rebut the presumption. In speaking of the presumption of payment, the Court said (p. 450):

"It is, however, one of those strong presumptions which shift the burden of proof; which, from frequent occurrence, have become familiar to the courts, and which being constantly recommended to juries, from motives of policy have acquired an artificial force, and become as important as presumptions of law." . . .

"It is not understood that, in this case, the Circuit Judge did more than urge upon the jury the well-recognized presumption of payment, from lapse of time, and express his unfavorable opinion of the circumstances that had been adduced to rebut it. Just as in *Williaume v. Gorges*, Lord Ellenborough thought that after the lapse of twenty years, the presumption that a judgment had been

paid, was not rebutted by the circumstances of the defendant's absence and insolvency, and, therefore, directed the jury to find for the defendant.

"The matter which, on this head, is most objected to, is that the Judge held that mere acknowledgments, that the debt had not been paid, made after the expiration of the twenty years, were insufficient—that if there had been no payment or interest, no promise to pay, no other sufficient rebutting circumstance, an acknowledgment, to suffice for rebutting the presumption, should be a distinct admission of the subsisting legal obligation of the debt, unaccompanied by any conduct or expressions indicative of an unwillingness to pay. This Court perceives no objection to the rule thus stated to the jury. The presumption is no legal bar, but it originally was admitted in analogy to the, then, prevailing statute of limitations, and in considering admissions which rebut it, the same principles are applicable as in considering admissions to take a cause of action out of the statute of limitations. So long as the lapse of time is merely circumstantial evidence, which, by ordinary inference, creates belief (as where it is less than twenty years, and is adduced along with other circumstances), any admissions which oppugn the inference of payment drawn from it, go to the jury along with it, and all are weighed together according to their natural force. **But, when, by the expiration of full twenty years, the presumption of payment has acquired an artificial force, so that it stands in place of belief, an admission that the payment has not, in fact, been made, cannot of itself destroy the effect which considerations of policy have given to a certain period of time, whether the payment has or has not been made.**"

In **Sellers v. Holman**, 20 Pa. 321 (1853), the Supreme Court of Pennsylvania (Chief Justice Black) stated the law as follows (p. 323):

"The court below instructed the jury substantially, that two notes, one of which was more

than thirty and the other upwards of twenty-seven years old before suit brought, must be presumed to have been paid, unless that presumption was met by something more than a mere naked demand of the debt by the obligee within twenty years.

"The only fair objection to the charge is, that the Judge has defended his positions too well. The question was not worth a tithe of the labor and learning he bestowed on it.

"Perhaps, if this point had arisen half a century ago, it would have been decided in the way the plaintiff desires it to be decided now. But the old cases concerning the statute of limitations and the kindred subject of presumption from lapse of time, are not of very great authority in the present day. Those rules which give repose to Society and forbid the assertion of stale claims, after the evidence of their discharge has been lost, are everywhere much more highly appreciated by the courts now than they were once. It has, however, not been decided in any case, ancient or modern, that a mere demand, without more, is enough to repel the presumption, and in one, at least (1 Ves. & Be. 536), the contrary was held. In this State, we have never had occasion to determine it. It is a new point here, with the English authorities rather against the plaintiff than for him, while the arguments on principle and policy are altogether in favor of the defendant.

"That a specialty or debt of record is paid after twenty years from the time it became due, is a presumption of law which the courts must enforce without inquiring whether it be according to the truth or not. The law has given to this lapse of time a fictitious value, equal to direct proof of payment. But the evidence of non-payment, by which the presumption is to be repelled, has no force, except what it derives from its intrinsic power to produce conviction on the mind. A circumstance, therefore, which does not actually disprove the payment, nor satisfactorily account for the delay, is entitled to no weight. The presumption of payment is raised by an artificial rule.

It cannot be rebutted, except by evidence which will create a natural presumption, at least equally strong."

In **Miller v. Overseers of the Poor**, 17 Pa. Super. 159 (1901), the plaintiff "testified positively, clearly and without contradiction of any kind and without doubt being thrown upon his veracity, that the judgment had not been paid at the time of trial."

Chief Justice Rice said (pp. 160-163):

"After a lapse of twenty years, mortgages, judgments and all debts, no matter how solemn the instrument evidencing them may be, are presumed to be paid. And such presumption stands until rebutted. It gathers strength as time advances, and after thirty years it cannot be overcome by anything but 'clear proof': Peters Appeal, 106 Pa. 340; Geiger's Estate, 14 Pa. Super. Ct. 523, and cases there cited." . . .

"We hold, then, that the plaintiff's testimony that the judgment had not been paid to him, standing alone, would not completely overthrow the presumption."

In **Holway v. Sanborn, et al.**, 145 Wis. 151, 130 N. W. 95 (1911), the Supreme Court of Wisconsin gave some of the reasons that might be presented to explain the delay (p. 155):

"The following circumstances bearing on the question, particularly applicable to this case, are mentioned; the absence of the debtor from the State during the greater part of the time relied on to create the presumption (*Daggett v. Tallman*, 8 Conn. 168; *McLellan v. Crofton*, 6 Me. 307, 334); facts preventing the creditor from bringing suit (*Hale v. Pack's Ex'rs*, 10 W. Va. 145; *Crooker v. Crooker*, 49 Me. 416); relationship of the parties and that the collection of the money might have occasioned distress or great inconvenience (*Wanamaker v. Van Buskirk*, 1 Saxt. Ch. [N. J.] 685).

Many other circumstances might be mentioned, among them some characterizing this case, as the jury might reasonably have concluded from the evidence; such as, possession of the note by the payee down to the time of his demise; finding it among his papers notwithstanding pretense that at a personal interview, the details of which were excluded under the statute, it was claimed to have been paid; finding it among his valuable papers apparently as an existing obligation; efforts to avoid service of papers within the State and efforts to obtain such service within the twenty years." . . .

In **Foulk v. Brown**, 2 Watts 209, 215 (Pa. 1834), the Court put very clearly the reasons and advantages of a strict compliance with the rules regulating the presumption of payment.

"The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity; and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away; and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them."

In the case of **Christy v. N. Y. C. & H. R. R. Co.**, 101 Atl. 372 (N. J. 1917), in the Court of Errors and Appeals of New Jersey, which was an action to recover the value of certain cut and piled lumber, the Court gave what was the effect of an unexplained delay and said (p. 374):

"The presumption of payment or release arising from lapse of time is not necessarily a con-

“conclusive and absolute presumption. The lapse of time gives rise to a conclusive and absolute presumption only **when not satisfactorily accounted for or explained**, but, when so accounted for or explained, the delay still remains as one of the facts in the case upon which the ultimate question of payment or release is to be determined “in connection with the other evidence.”

There is no allegation in the case at bar that the claim of the United States has been recognized in any way by the Canal Company. Under these circumstances the authorities quoted establish that where the delay of twenty years in making a demand for payment is unexplained, the presumption of payment which has been created by this lapse of time has not been rebutted, and the claim is paid in the eyes of the law, whether such payment has been actually made or not.

THE TRIAL JUDGE'S CHARGE TO THE JURY.

Binding Instructions Should Have Been Given.

The charge of the trial Judge upon the weight that should be given to the presumption of payment is set out in assignments of error 13 to 19 (pp. 12 to 19). In the assignment 13 it will be seen that the Court instructed the jury that the question was whether the Canal Company had failed to pay the dividends to the United States. This would seem to be directly in the teeth of the decisions quoted in this brief. The question is not whether the dividends are paid, but whether the Government has produced evidence that convinced the jury that they had not been paid. The charge was inadequate and misleading (assignment 19, p. 12), inasmuch as the Court entirely failed to instruct the jury as to the strength of the presumption of payment after this long lapse of time, and incorrectly stated what was the question the jury had to pass upon.

IN THE
Supreme Court of the United States.

October Term, 1918. No. 192.

CHESAPEAKE AND DELAWARE CANAL COM-
PANY,

Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,

Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTARY BRIEF IN BEHALF OF THE
CHESAPEAKE AND DELAWARE CANAL
COMPANY, PLAINTIFF IN ERROR.

In the argument in the Paper Book of the plaintiff in error, pages 54-56, the following question of law was considered, but not with that detail its importance demanded:

(A) Did not the defendant in error—the United States—come down, from its position of sovereignty and enter the domain of commerce, when it became, by *Act of Congress*, a stockholder in the private profit-sharing Chesapeake and Delaware Canal Company?

(B) If “A” be answered in the affirmative, then the United States is barred by the Statute of Limitations from bringing suit to recover dividends due and

unclaimed since some thirty-odd years ago, as a suit by an individual stockholder would be barred, under like circumstances.

(C) It is not obligatory that the bar of the Statute of Limitations must be specifically pleaded—the Court itself will, of its own initiative, interpose the bar of the Statute of Limitations where the question is: whether the right to enter suit is not barred by the statute.

Practically the entire argument in our Paper Book is taken up, with the consideration of the following fundamental questions:

(D) Is it not the Rule of the Law of Evidence, that, after twenty years, payment will be disputably presumed, which shifts to the plaintiff the burden of proof to establish non-payment?

(E) This Rule of Evidence applies to the Sovereign—the United States—as it applies to an individual. It has nothing to do with the Statute of Limitations, it is purely a Rule of Evidence, and, **as in the case of an individual, so, in the case of the United States, the longer the delay, the stronger must be the evidence of payment, for the reason that, the counter evidence of payment is rendered tremendously difficult by the delay of over thirty-odd years in presenting the claim.**

“D” and “E” present the questions considered in the main argument.

The question in “A”, “B” and “C” is equally fundamental and can always be considered. It is of great importance, in that, it will lead necessarily, to the conclusion of the case—if it be found to be well taken. This question, in our opinion, after a very earnest reconsideration of our Paper Book, pages

54-56, has not there received the consideration its importance demands, therefore, we crave permission to file this short Supplementary Brief.

The following is the opinion of the trial Judge, upon this question—Transcript of Record, page 16 206 Fed. Reporter 964:

“There is nothing in the declaration or bill of particulars to indicate that the money sued for, *if recovered*, would not go into the national treasury and form part of the public funds to be devoted to public and not to private purposes. It must be assumed, in the absence of an allegation to the contrary, that whatever moneys may be recovered in this action will be paid into the treasury of the United States to be disposed of as part of the public moneys. Under these circumstances it is wholly immaterial that the United States became entitled to the money, which, if recovered, is to go into the national treasury, through its ownership of stock of the defendant company or through an investment in any other form for its benefit. The United States in so suing for the recovery of money for the national treasury is proceeding in its sovereign capacity and cannot be defeated by a State Statute of Limitations.”

“lic funds to be devoted to public and not private the money which, if recovered, is to go into the

The Circuit Court of Appeals, in reversing the District Court, 223 Federal Reporter 926, said, page 927:

“the Company, contending that the government abdicated its sovereignty by acquiring stock in a commercial corporation and should, therefore, be treated merely as a private shareholder, who would of course *be barred by the statute . . .* the fallacy of the company’s argument seems to lurk in the assumption that in this action, the government is asserting a right in its character as a stockholder. *Undoubtedly the right came into being because the government owns the*

“stock, but in no other respect has the suit anything to do with such ownership. *The government is not suing as a stockholder; it is suing as a creditor*, and in this character alone, it is now to be considered. The right set up is a right to recover a sum of money from the company; and could be urged quite as effectively *by an assignee of the dividends*, although he might never have been a stockholder at all.”

That is, both these courts below held: The United States is acting in its sovereign capacity in recovering these dividends, because, *when recovered*, they will go into the public treasury for public use. *There is no decision in this court to this effect, or, in any other court of last resort, we have been able to find.* We do not believe such a decision has ever been made in any substantial court, for, it is so manifestly wrong—the United States, as a *stockholder* in a business corporation to possess equity rights in the corporate funds superior to the equity rights of its co-equal stockholders. The lower courts have completely ignored the facts stated by Chief Justice Marshall, in *U. S. Bank v. Planters' Bank*, 9 Wheat. 904, on page 908.

“The Government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.”

Moreover, the contention of the courts below is not sound, for this reason, all dividends of all stockholders, if paid in fraud of creditors, can be pursued by the creditors, hence if the dividends received by the stockholder—the United States—are exempted from this obligation, then, this would place on the other stockholders an inequality which the United States agreed to share, when it became—not a sovereign stockholder, but—an individual stockholder.

There is not such a thing as a sovereign stockholder in a private corporation for profits. And besides, the United States became a stockholder in this business corporation, *by virtue of an Act of Congress*. The Act of Congress permitted them to become an *individual* member of a private corporation for profit.

What we have just said leads to the consideration of two *preliminary* questions (a) The true nature of a corporation, and (b) the nature of a dividend.

(a) The existence of a corporation independent of its shareholders is a *fiction*, because the rights and duties of the persons who compose it are not those of an imaginary being and, therefore, the contract by which the corporation is formed is a contract, between its stockholders, and a mutual agreement between them for their mutual benefit, so, any shareholder can hold any other shareholder to a performance of his contract, and every stockholder is subject to the liabilities of all the stockholders—every share is equal to every other share and no special privileges or advantage can be given to any shareholder, for the reason, that any discrimination in favor of a particular stockholder will be made at the expense of the others. Every stockholder has the right to demand that all stockholders who have enjoyed the privileges of stockholders—for instance, dividends and profits, must also bear the burdens which may attach to these dividends and profits. Stockholders have equal rights and must bear equal burdens.

The above principles, briefly condensed, from Morawitz on Corporations seem conclusive—how is it possible that a stockholder can sue for a dividend some thirty-odd years after it is due, when all accounts have been lost, the corporate books balanced many years ago and the burden of paying the dividends to this individual stockholder—the United States—will

fall upon the assets, the joint property of all the stockholders, as will be made clear, in a moment, when we consider "b"—the nature of a "dividend."

The error in the Circuit Court of Appeals is this: Whilst the Court acknowledges: "Undoubtedly the right (to the dividends) came into being because the Government owns the stock," the Court proceeds: "The Government is not suing as a stockholder, it is suing as a creditor, alone." Why? Because the money, *when recovered*, will be placed in the public treasury, for the public use. This cannot be the law, of course, *after* the recovery, the money is the money of the United States, but *prior* to the recovery it is a *dividend*, due the stockholder—the United States, and must be recovered precisely as all the other individual stockholders recover their dividends.

(1) The well-recognized principle of the *Planters Bank Case*, *supra*: "The United States, in entering a private business loses her sovereignty and descends to the position of a private individual," indisputably establishes, that in the principal case, the United States took on this individualistic character, *by virtue of an Express Act of Congress*.

(2) And of that other well-recognized principle, just stated, that stockholders in a private corporation have mutual rights and mutual burdens, because of the contract of membership. These mutual rights and mutual burdens are not those of that imaginary *fiction*—the corporate entity, but of the individuals composing that entity.

(3) And furthermore, in *United States v. Nashville*, etc., 118 U. S. 120, 125, this court examined the facts with the minutest care in order to find out how the money sued for was employed: whether it was (1)

Government money arising out of a public right or a public interest, or (2) Government money arising out of its employment in a private enterprise, in which the Government was taking part. In "1" the Government would be suing in its sovereign capacity, but in "2" it would be suing as an individual as in *Cooke v. The United States*, 91 U. S. 389, 398.

(b) The nature of a "dividend," "stock" and "dividend" are practically the same thing—"a dividend is a portion of the principal or profits, divided among the several owners of a thing." In *Wood v. Drummer*, 3 Mason 308, Mr. Justice Story speaks of a "dividend" as a *portion* of the capital stock. Stockholders' rights are: the residuum after payment of debts, which may be turned over from time to time as dividends." A "share" is a right to partake according to the amount of the party's subscription in the surplus profits obtained from the use of the joint capital stock." By "bank stock" is meant: an individual interest in "dividends" as they are declared and a right to a *pro rata* distribution of the effects of the bank at the expiration of the charter." The corporate capital stock is the undivided equitable assets of the corporation, held in trust by the body corporate, (1), for the creditors and (2), the residuum for the stockholders, whose *pro rata* share therein, is represented by a certificate of shares and which dividend comes to the stockholders in profits, from time to time, in the shape of "dividends," and then, at dissolution "dividends" of the residuum, after payment of debts.

From the above analysis of a "dividend" it is idle to contend that the individual private stockholder, the United States, has any higher rights upon the corporate funds than the other private individual stockholders—all associated together as private stockholders, in a private profit-sharing business corporation. If the contrary be true, as held by the courts below,

then, one stockholder has superior rights in the jointly owned fund, because the dividends claimed have entirely disappeared after the delay of some thirty odd years, and if they are paid now, the money to pay them must be taken out of the corporate assets, which, positively belong to all the stockholders alike.

The decision of the court below must be accepted and must be predicated upon the following facts; *which facts, however, cannot lead to the said decision:*

The United States were authorized, *by a specific Act of Congress*, to become a stockholder in a private corporation for profit. This Congressional authority really meant—according to the repeated decisions of this court—that the Congress authorized the United States “to come down from its position of sovereignty and to enter the domain of commerce,” in associating with its fellow stockholders, sharing in the mutual benefits and the mutual burdens of the joint association.

Upon the above facts the courts below held: “In suing for its dividend the United States was acting in its sovereign capacity,” and the courts so held, for this one single reason, only: the “dividends,” when recovered, will go into the public treasury for the public use.

In suing on a promissory note, the money if recovered, will go into the public treasury, of course, but that fact does not relieve the United States from complying with the *law merchant*, which binds all individuals. *U. S. v. Baker*, 12 Wheat. 559. However, there is no possible doubt of the correctness of the Court’s statement *but*, it is dependent upon the fact—the court so states—“the dividends,” *when recovered*, etc., etc.” That the dividends become public money *when recovered*, of course, does not admit of the slightest doubt, as said in *Van Brockline v. Tennessee*, 117 U. S. 151, by Mr. Justice Gray, page 158: “The United

“States do not and can not hold property as a monarch
 “may, for private or personal purposes. All the prop-
 “erty and revenues of the United States must be held
 “and applied, as all taxes, duties, imports and excises
 “must be laid and collected, to pay the debts and pro-
 “vide for the common defence and general welfare of
 “the United States.” Please note, Mr. Justice Gray
 says the United States holds property for the common
 defence and general welfare of the United States.
 But it is a very different question, whether, in
 the act of recovering the dividends, the United
 States is not bound by the same rule which
 applies to its fellow stockholders. It is difficult
 to see why this is not the case, for the dividend was
 declared for all individual stockholders, and as the
 dividend of the individual United States stockholder
 has been lost, if recovered, **it must be paid out of assets,**
which at this very moment belong to all the stockhold-
ers, and why should they be called upon to pay a second
dividend to a fellow stockholder when this stockholder
could not be called upon to pay his share of a (second)
dividend to a fellow stockholder, because his demand
would be barred by the Statute of Limitations. The
 equal burdens, all stockholders have contracted to bear,
 can be satisfied only by applying the Statute of Limita-
 tions alike to all claims for stale dividends.

We have made the most thorough search of the de-
 cisions of this court, and we have not been able to find
 one case or even a Rule of Law or a principle an-
 nounced in this court, which would affirm the decision
 of the court below.

In order to present the case clearly, we shall refer
 to a few decisions: *United States v. Nashville Ry. Co.*,
 118 U. S. 120, 125 (1885) is distinguishable. This court
 held the United States sued in its sovereign capacity.

Of course, this case is the law, but it is so clearly sound that he who runs may read how correct is the decision. The court went into the market and bought coupon bonds and held these bonds, under an agreement, in trust, for the Chickasaw Indians. The money with which the bonds were purchased came from the sale of the land of the Indians. Mr. Justice Gray, page 126, said:

“Those lands, the money received from their sale, and the securities in which that money was invested, were held by the United States, in trust, to be applied for the benefit of those Indians, in performance of the obligation assumed by the United States by treaties with them. The securities were thus held by the United States for a public use in the highest sense, . . . and they continued to be so held until that obligation had been performed and discharged, . . .”

After the obligations of the trust had been carried out the bonds came into the possession of the United States of their own right. Mr. Justice Gray continues:

“after which they (the bonds) were held by the United States like all other property of the government, for the ordinary public uses. *Van Brockline v. Tennessee*, 117 U. S. 151, 158.”

The distinction between this (a) *Nashville Ry. Co.* case and (b) the principal case, is perfectly clear. In “a” the United States were suing for the recovery of United States money invested in railway bonds, but, with the railway, *itself*, or with its stockholders, the United States had no sort of relations—at no moment was the United States in any way associated with the railway—its profits and its losses were not of the slightest interest to the United States, so that the Railway paid the interest on its bonds owned by the Government. The United States did not owe the railway or any of its stockholders one single obligation—in fact,

all its interests were antagonistic to those of the railroad and its stockholders. In (b) however, the principal case, all the obligations of the United States are exactly the converse of all they were in "a."

In *United States v. Beebe*, 127 U. S. 338 (1887), and in *United States v. Insley*, 130 U. S. 263 (1889), the United States were acting in their sovereign capacity, and *United States v. Nashville, etc., Ry. Co., supra*, was followed. In the *Beebe* case, however, Mr. Justice Lamar held the United States could not be made the plaintiff in order to get the benefit of the Statute of Limitations, when the whole interest belonged to others, as Mr. Justice Lamar said: "Mr. Justice Gray was careful to say this in the *Nashville* case, *supra*."

It is not necessary to cite more cases, for it is perfectly clear and no one doubts it, that the United States is suing in its sovereign capacity when it is suing for the recovery of its money in corporate securities, which securities do not give the United States the slightest interest in the corporate affairs or which securities do not in any way lessen the sovereignty of the United States, but, contra, an entirely different question is presented when the United States' money has been invested by virtue of a specific Act of Congress, in stock or a business corporation for profit. And, furthermore, it is not the fact that the money, *when recovered*, will go into the public treasury for public use, which determines the character in which the United States is suing, but rather, how the money is invested, is the determining factor—if the money is invested directly in commercial pursuits, or if the money is used to purchase stock in a commercial company—making the United States a stockholder in such company, then the rights and liabilities are burdens of the United States which are quite the same, in every regard, as those of the United States' private individual fellow stockholders.

Cooke v. United States, 91 U. S. 389, 398 (1875), is decisive; the fact that the money will go into the public treasury, when recovered, makes the stockholder—the United States *after* its recovery a sovereign, but *before* its recovery, when suing for the dividend, it is acting as a private individual, not in a sovereign capacity. The contention of the court below, we cannot find, has ever been made, or so decided, by a court of last resort. Not one of the promissory note cases cited by Chief Justice Waite, in the *Cooke* Case, maintain it, and in any case, of course, the United States' money, when recovered, becomes public money, but *until* recovered, it must be burdened with all liability of the money of every fellow stockholder of the United States. Chief Justice Waite said, page 396, and on this point the dissent of Justices Clifford, Field and Bradley is not founded:

“It was conceded in the argument, that when the United States become parties to commercial paper, they incur all the responsibility of private persons under the same circumstances. This is in accordance with the decisions of this court.”

Upon this point, this *Cooke* case remains the law today. It has constantly been referred to by this court, and upon this point not even questioned. As the Chief Justice said: “This is in accordance with the decision of the court,” and the Chief Justice then cites a very early decision to this effect, for instance: *United States v. Barker*, 12 Wheaton 559. Perhaps it should be stated that at first blush it may seem as if this court did not approve of this *Cooke* case, in the opinion of Mr. Justice Gray in *District of Columbia v. Cornell*, 130 U. S. 655 (1889). Mr. Justice Gray explains *Cooke v. United States* to distinguish it and he then states: “We are not prepared to extend the scope of that decision.” But, by these words, Justice Gray, is referring to the fraud

in the Cooke case, which he had been considering in the previous paragraph.

In *National Bank v. United States*, 151 Fed. Rep. 402 (1907), Judge Putnam, page 407, cites *Cooke v. United States*, *supra*, as holding: "in the event officers of the United States are authorized, by statute, to issue what is in form commercial paper, and do issue it, the relations of the United States thereto are the same as those of individuals," so too, we add, the United States when authorized by Act of Congress, to become stockholders in a private corporation for profits, the relations of the stockholder—the United States, to its fellow stockholders are the same as those of individuals. District Judge Aldrich was in dissent, page 409, not thinking that pension checks or warrants should be treated as relating to a commercial transaction, in respect to which the Government comes down from its position of sovereignty and enters the domain of commerce, but approving of *Cooke v. United States*, *supra*. When this case came before the Supreme Court on appeal, *United States v. National Exchange Bank*, 214 U. S. 301 (1909), this court followed the dissenting opinion of District Judge Aldrich just referred to, agreeing with him that the United States should recover, distinguishing the *Cooke* Case, but not in any way questioning it, insofar as regards the law that, in commercial transactions the United States comes down from its position of sovereignty and enters the domain of commerce.

The money to pay these dividends was originally taken out of the assets, which belonged, jointly, to all the stockholders. If the United States can recover payment of these lost dividends, after thirty odd years delay in bringing suit, then the money to make payment will have to be taken, a *second time* out of these jointly owned assets, now owned, probably, by entirely different stockholders, thus, an injustice will be perpetrated

by the stockholder the United States upon its fellow stockholders, for, they will have to contribute a *second* time in order to pay the United States after thirty odd years of delay in bringing suit.

A "dividend" declared in a debt—a debt due a stockholder—due every stockholder. But it is a debt burdened with certain obligations—alike applicable to every stockholder. This last statement becomes perfectly clear from the following: If a dividend is declared and paid, in fraud of creditors, it does not make the slightest difference, roughly speaking, whether the dividends belong to the individual stockholder—the United States—or to any other individual stockholder; in either event, creditors, or the remaining fellow stockholders can follow the money, paid as dividends, and recover it, to help to make up the necessary amount—its proportionate share of the fund needed to pay the corporate creditor—each stockholder has the right to call upon every one of his fellow stockholders to contribute to the amount needed to pay the corporate debt. This point has nothing to do with this question: Whether the individual shareholder—the United States, has deposited their dividend, *after* it has been received, in the public treasury. Our only purpose here is to draw attention to this fact: Any stockholder to whom a dividend has been paid (it is not of the slightest importance if that stockholder happens to be the United States, for in this case the United States is a stockholder in a corporation for profit, by virtue of a special authoritative Act of Congress) cannot escape the obligations which are attached to his dividend, even though, *after* its recovery, the money has been turned into the public treasury. This fact is not of the slightest deterrent force, for each stockholder, including the United States, owes a duty to the corporate creditors and also to his fellow stockholders to contribute its

share to pay these creditors, and thereby, lessen the shares, which these co-stockholders would, otherwise, have to pay.

A fact of conspicuous significance presents itself, in connection with what we said in the last paragraph, in favor of the above contention of the plaintiff in error: There is no decision of this court, or of any court of last resort, we can find, wherein the sovereign is not acting as an individual, in its membership, as a stockholder in a commercial corporation for profit, *by virtue of a special Act of Congress*, just as all the individual stockholders are acting, with precisely the same rights and the same obligations towards each other; *for instance*, it is the decision of this court, that when the United States became a stockholder in a business corporation it did not confer upon that corporation or upon its *alter ego*—its fellow corporate stockholders, the exemption of the sovereignty of the United States. On the contrary, the United States descended to the position of its co-stockholders. How is it possible, when the United States thus descends, that it can escape the burdens which fall alike upon all the stockholders, and how can a dividend be due them, free of the obligations which burden the dividend of every other stockholder?

If a sovereignty has given its permission to be sued, then this right of action existing, it follows, that corporate creditors or stockholders can sue a fellow stockholder for his proportionate share of his dividend, received in fraud of creditors, even though this stockholder is the United States, whose dividend, upon its receipt, was deposited in the public treasury, for the public use. *Curran v. State of Arkansas*, 15 How. 304; *Ward v. Dummer*, 3 Mason (U. S.) 308, and *Main v. Mills*, 6 Biss (U. S.) 98.

A dividend is a chose in action—it must be demanded, and, if it is not demanded for over thirty-odd

years, and there is no part of that dividend fund remaining in the corporate treasury, then it can be paid only out of the assets, jointly owned by all the stockholders and this is the result: This delay of thirty-odd years of one stockholder, in demanding his dividend, will place upon his fellow stockholders the burden of raising funds a second time—this time, out of the mutually owned corporate assets, thereby lessening their own profits in any dividend subsequently declared. This contention is absolutely untenable.

“Dividends are payable out of profits or earnings, hence, a corporation cannot pay them from the capital, leaving insufficient assets to pay the corporate debts, without committing a fraud upon the corporate creditors”,

and, as stated by the Court in numerous cases, when stockholders are so paid, the fund can be followed and recovered.

The Cyclopaedia of Law, in considering “dividends”, says:

“Statutes of Limitations run against the government in ordinary trade relations, when the government divests itself of its attributes of sovereignty and enters into ordinary trade relations, the government loses its immunity from the statute and is governed by the same limitations as an individual under like circumstances.”

Surely, the government stockholder in a commercial corporation cannot escape its own responsibilities, by placing extra burdens on its fellow stockholders.

It may be said, speaking roughly, that a corporation may “set off” the debts of stockholders on dividends, whether dividends are regarded (1) as a debt due from the corporation to its stockholders, or (2) as so much money in the possession of the corporation be-

longing to the stockholder. Surely such money cannot be recovered, *after* a delay of over thirty-odd years in demanding it.

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(m)



In the Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 192.

CHESAPEAKE & DELAWARE CANAL COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

The Chesapeake & Delaware Canal Company is here seeking to reverse a judgment of the Circuit Court of Appeals for the Third Circuit affirming a judgment of the United States District Court for the District of Delaware in favor of the United States for the amount of three dividends, with accrued interest, on 14,625 shares of stock of the canal company owned by the Government (R. 10, 28, 378-379).

The dividends were declared in the years 1873, 1875, and 1876, and amount in the aggregate, exclusive of interest, to \$51,187.50.¹ Formal demand for

¹ With interest from November 17, 1911 (when the Secretary of the Treasury demanded payment), to the date of verdict, they amounted to \$63,924.66, for which amount judgment was entered. (R. 28, 267, 272.)

their payment was made in November, 1911, and refused, and this action was commenced in March, 1912. There is no dispute either as to the Government's ownership of the stock or as to the dates and amounts of the dividends, or as to the fact that the dividends became due and payable to the United States at the times when they were respectively declared. The only questions presented relate to the presumption of payment arising from the lapse of time since the accrual of the Government's claim and before demand for its payment or institution of suit for its recovery, and to the evidence by which the presumption of payment was overcome.¹ (R. 1. 10-11, 266-267.)

The case has been twice tried before a jury and has been twice before the Circuit Court of Appeals (R. 366; 223 Fed. 926; 240 Fed. 903). At the first trial the Government merely proved its ownership of the stock in the canal company, the declaration by the canal company in 1873, 1875, and 1876 of the dividends sued for, and the fact that payment of the dividends was demanded and refused in 1911. The defendant offered no evidence, and the trial judge, on

¹ In the district court a plea of the statute of limitations (of Delaware) was rejected, on demurrer, and this action was sustained by the Circuit Court of Appeals on the ground that a State statute of limitations is inapplicable to a suit brought by the United States in its sovereign capacity. (R. 11, 12, 13, 15-22; 206 Fed. 964; 223 Fed. 926, 927-928.) Specifications designed to renew the question were included in the assignment of errors when the case was again before the Circuit Court of Appeals (Nos. 1, 15, 25, 26, 27; R. 345, 353, 357) but were not pressed; they are omitted from the assignment of errors in this court and the contention on the part of the canal company that the Delaware statute barred the present action is not made here.

the theory that the common law presumption of payment should not be applied against the United States, directed a verdict for the plaintiff and entered judgment in its favor. This judgment was reversed by the Circuit Court of Appeals (223 Fed. 926) on the ground that the presumption did apply even against the sovereign. But as the presumption was rebuttable a new trial was ordered.

At the second trial the Government, besides proving the facts formerly proved, introduced evidence to show nonpayment of the dividends as a matter of fact. The defendant, as before, offered no evidence. The case was submitted to the jury on the Government's proofs, the trial judge stating in his charge (R.266-272), among other things, that the case turned upon the single question of the payment or nonpayment of the dividends by the canal company to the United States (R. 267). A verdict and judgment in favor of the plaintiff again resulted. This judgment was affirmed by the Circuit Court of Appeals, and the present writ is prosecuted by the canal company to review the judgment of affirmance.¹ (R. 28, 366, 378.)

¹ The evidence adduced by the Government to show nonpayment of the dividends is discussed *infra*, pp. 19-36, 49-53. It consists, in the main, (a) of autoptic evidence, viz, forged vouchers, receipts, and correspondence purporting to emanate from the Government and to show payment of the dividends, which papers were produced under *subpoena duces tecum* from the files of the canal company, where they were found mixed with genuine vouchers and receipts for earlier dividends that actually were paid by the company to the Government (R. 38, 46, 53-54); (b) proof of the fact that the fabricated papers were exhibited as late as 1913 and 1914 by officers of the canal company to the agents of the Government as the company's evidences of payment (R. 46, 53, 57, 67-68); (c) the direct testimony of a former

THE ISSUES.

The assignment of errors (R. 379-399) contains forty-one items,¹ but yields, on analysis, only three basic questions which require consideration, namely:

First.—Was it incumbent upon the Government in order to rebut the presumption of payment not only to show nonpayment but “to explain the reason of the delay in making demand for payment”?

Second.—Was the evidence introduced by the Government to show nonpayment competent for the purpose?

Third.—Assuming its competency, was the evidence sufficient to justify the verdict of

employee of the canal company to the effect that the dividends sued for had not been paid by the canal company prior to 1886 when he left the company's service, but that he and another employee of the company had embezzled the company's funds which should have been used to pay them, had withheld the sending to the Government of the customary notices of the declaration of the dividends, and had fabricated the vouchers, receipts, and correspondence, just referred to, purporting to evidence payment (even securing a small printing press and special type for the purpose of imitating the letterhead of the Treasury Department, R. 132) (R. 116 et seq.); and (d) proof of the absence from the appropriate files and records of the Treasury Department of any notice of the declaration of the three dividends sued for or any entries indicating that they were ever paid, whereas notices of all prior dividends were found in the department and produced and there was full record of their payment. (R. 159-164, 195-197, 200-261; Gov. Exs. No. 67, 77; R. 301, 317.)

A summary of this evidence appears in the opinion of the Circuit Court of Appeals (R. 366-373) and is reproduced *infra*, pp. 45, note.

¹ Nos. 1 to 12, inclusive, renew objections made by the defendant to the District Court's rulings on evidence offered by the plaintiff. Nos. 13 to 19 renew objections to the trial judge's charge to the jury. Nos. 20 to 31 are objections to his refusal to instruct the jury as requested by the canal company. Nos. 32 to 41 challenge generally the correctness of the judgment of the Circuit Court of Appeals and raise objections to various holdings of that court as indicated in its opinion (R. 366-378).

Assignments No. 2, 5, 17, 29, 33, 37, 38, and 39 are not now relied on by the canal company. (See Brief for Chesapeake & Delaware Canal Company, pp. 5-21.)

the jury that the dividends had not in fact been paid?

In reference to those assignments which were before the Circuit Court of Appeals that court said (R. 378):

We see no need to discuss the assignments of error in detail; no reversible error was committed in the conduct of the trial, and the judgment must therefore be affirmed.

ARGUMENT.

I.

THE DUTY WHICH CONFRONTED THE GOVERNMENT AT THE TRIAL WAS MERELY THAT OF PROVING NONPAYMENT OF ITS CLAIM. IT WAS UNDER NO REQUIREMENT "TO EXPLAIN THE REASON OF THE DELAY IN MAKING DEMAND FOR PAYMENT" SAVE IN SO FAR AS SUCH EXPLANATION MIGHT BE INCIDENTALLY INVOLVED IN OVERCOMING THE PRESUMPTION OF PAYMENT.

The single duty which confronted the Government at the trial (aside from the obvious one of proving the original indebtedness, as to which there is no dispute) was to overcome the presumption of payment, arising from the lapse of time, by affirmative proof that the claim had never been paid. There can be no real disagreement as to this fundamental proposition, although the canal company, as later shown, tries to avoid its consequences. It was solely in view of the presumption, and of the failure on the part of the Government to repel it by proof, that the case was remanded by the Circuit Court of Appeals to the District Court for a second trial (223 Fed. 926, 928-933). The appellate court on that occasion said (pp. 928-929):

* * * If the plaintiff can not make out a prima facie case without showing also the fact of nonpayment for more than 20 years, the presumption of payment immediately arises, attaches at once to his evidence, and weakens it to such an extent that he can not recover unless he goes further and undertakes to prove facts tending to repel the presumption. The defendant is not required to repeat the proof that 20 years have elapsed without payment, for that has already appeared; he need only call the court's attention thereto, and may then

rest upon the presumption or inference of fact arising therefrom until the plaintiff has strengthened the weak point in his own attack. If, however, the plaintiff makes no effort so to do, he fails altogether, but he fails solely for the reason that he has not made out his case—in other words, because his evidence lacks persuasive power. But the presumption is disputable, not conclusive. To a plea of the statute of limitations, the plaintiff can not successfully reply that the debt is still unpaid. The defendant may admit nonpayment without impairing the effect of the plea in the least; but if he makes such an admission, or if the plaintiff offers affirmative proof to the same effect, this is a complete reply to the presumption, and establishes the right to recover. If the evidence bearing on the fact of nonpayment is ambiguous or contradictory, a question is presented for decision in the usual manner; generally by the verdict of a jury.

The court then stated that neither party controverted the rules thus announced, "if the action were between individual litigants," and held that they were as applicable to a case in which the United States as plaintiff was suing for a debt as to a case between private parties. (223 Fed. 926, 929.) And this declaration of the law supplied the guide for the subsequent proceedings in the trial court.

The canal company itself did not deny in either of the lower courts, and does not here deny, that the presumption of payment arising from the lapse of time is rebuttable. (R. 264, 377; Canal Company's Brief below, p. 19; Brief in this court, pp. 4, 22-23,

56.) It urges, however, that the United States was bound "to explain the reason of the delay in making demand for payment." ¹(Brief in this court, pp. 51-69.) This contention misconceives the true nature of the Government's duty—which was merely to prove that the dividends sued for had not been paid—and confuses the law respecting presumption of payment with that in reference to laches. The latter can have no application here, as it is settled beyond dispute that the Government is not chargeable with laches or delay on the part of its agents. (*United States v. Nashville Railway Co.*, 118 U. S. 120, 125; *United States v. Beebe*, 127 U. S. 338, 344; *United States v. Insley*, 130 U. S. 263, 266-267; *United States v. Dalles Military Road Co.*, 140 U. S. 599, 632; *Stanley v. Schwalby*, 147 U. S. 508, 514-515; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409.)

¹ The attention of the court is invited to the fact that the company's contention in this regard is self-contradictory. At page 4 of its brief it recognizes that the duty which lay upon the Government at the trial was to rebut the presumption of payment. Pages 22 and 23 contain the same recognition, and at the latter page, in evident reliance upon the decision of the Circuit Court of Appeals in 223 Fed. 926, 929, the canal company states that "the Government was held bound to show that the dividends had not been paid." [Italics ours.] Pages 23 to 51 are devoted to an attempt to show that the Government failed to perform this duty, and the conclusion is reached (p. 51) that "the Government have produced no evidence to rebut the presumption of payment." But "if this evidence [i. e., the Government's evidence] was admissible," the brief continues, "the strength of the presumption must be considered, as the canal company rest their defence entirely upon the presumption of payment which arises from two facts:

"1. The unexplained delay of the Government for over thirty-five years in making demand for payment.

"2. The failure of the Government to show that their claim was unpaid during the twenty years prior to bringing suit" (pp. 51-52).

Then follows a discussion (pp. 52-69) of the alleged duty on the part of the Government to explain the delay in making demand for payment, and

Therefore, as the Government was not under the imputation of laches, it would have been idle and

the positions are successively taken by the canal company (a) that "the presumption of payment is a rule of evidence that is created by the unexplained delay of twenty years in instituting suit" and that *when the delay is unexplained* "the presumption has arisen and must be answered before the Government or the individual can recover" (p. 53); (b) that "the authorities quoted * * * show that unexplained delay of twenty years is a bar unless there has been what is tantamount to an admission within twenty years before suit, that the debt remains unpaid" (p. 54); (c) that when the Government "presents its claim which on its face is over twenty years old, a rebuttable presumption has arisen that this claim is paid, and unless this delay is explained, or the presumption which has been created by it, answered, there can be no recovery;" (d) that "to sum up this whole matter, under the authorities if the Government has failed to explain the delay of over thirty-five years * * * or has not shown nonpayment within twenty years, the presumption of payment becomes a bar to any rights of recovery" (p. 56); (e) that "in the eyes of the law [a claim] is paid, unless some reason is shown why the plaintiff did nothing during that period" (p. 59); (f) that "no court has held that no explanation is necessary" (p. 60); and finally (g) that because "there is no allegation * * * that the claim of the United States has been recognized in any way by the canal company" and because "the delay * * * in making a demand for payment is unexplained," therefore "the presumption of payment which has been created by this lapse of time has not been rebutted, and the claim is paid in the eyes of the law, whether such payment has been actually made or not" (p. 69). [Italics ours.]

From these excerpts it is apparent that the canal company entertains no fixed conception as to what the Government's duty at the trial really was, or in reference to the true nature of the presumption upon which the company threw itself. Its confusion results from the impossibility of reconciling the presumption of payment with the palpable fact of non-payment. It urges with entire indifference the contentions that it was incumbent upon the Government either to explain its delay or prove non-payment of the debt; both to explain the delay and prove non-payment; and to prove non-payment by explaining the delay. And finally, though still admitting the rebuttable character of the presumption, the company asserts in substance that the Government's right to a recovery was contingent upon showing what was tantamount to an acknowledgment of the debt by the canal company within the last twenty years, and that it makes no difference in the eye of the law "whether payment has actually been made or not" (p. 69). These mixed contentions are equalled only by the uncertainty of the company's position at the trial. It there objected (R. 36-37) to the introduction by the Government of evidence of events in 1873 on the ground that such evidence could not rebut the presumption "which has arisen in the twenty years prior to the bringing of this suit." Conversely, it objected to "evidence as to facts that happened in 1913" (R. 49) on the ground that such evidence could not rebut "the presumption which arises by the lapse of twenty years from the date it [the Government's claim] was due."

stultifying to require it, as an independent duty, to explain the delay in demanding payment. The Circuit Court of Appeals clearly perceived the confusion involved in the position of the canal company upon this point and disposed of the contention in the following language, which leaves little further to be said (R. 374-375):

* * * We do not agree, that before the Government could be allowed to prove the fact of nonpayment it was bound (as a separate obligation) to explain or excuse the delay. It is possible that the language used in some discussions of the subject will bear this construction, but even if this be true we do not find the point squarely decided, and in any event we are unable to see that the reason of the rule puts such an obligation on a delinquent creditor. *And, even if we assume that a private suitor might be obliged to explain or excuse his prolonged failure to sue, this merely requires him to account for his laches or negligence, and, as the sovereign is not bound by the laches of his agents, he cannot be compelled to explain a neglect that he may wholly disregard.* But in the case of a private suitor also we think the defendant's contention is not sound. Loose expressions may have been sometimes used on this subject, but *if the presumption and the reasons of policy that sustain it be closely considered we think it will appear that after twenty years the issue between the parties continues to be what it was before, namely, Has the particular debt been paid?* When the statute of limitations is interposed as a defense, the

question of payment becomes of no importance; the plaintiff cannot recover, although it may be certain that he has not been paid; but where the statute does not apply (and it does not in the present case), the issue of payment is the vital matter. Ordinarily, a plaintiff need do no more than prove the existence of his claim, whereupon the defendant must prove payment. But, if it appears from the evidence that the debt is of long standing, the plaintiff's task becomes progressively difficult, for the inference of payment may then be readily drawn from other circumstances; and, if the delay has lasted for twenty years, a definite presumption arises that is often the practical equivalent of the statute. Legally, however, it is not the equivalent; if he can, the plaintiff may always prove that he has not been paid, but his delay has somewhat changed the character of his task, and forces him to show reasons why the failure to sue should not be a bar. *These reasons may appear to be merely explanations or excuses, and may be so described without inaccuracy, but we think it equally accurate to say that they are really part of the evidence that tends by inference to show nonpayment.* For example, a dilatory plaintiff often proves the defendant's insolvency; this may be correctly spoken of as an excuse for delay, but just as truly it is a fact tending to show that the debtor has not paid because he could not pay. So, the absence of the debtor from the jurisdiction; this tends to show that he has not paid because he could not have been sued, and thus

compelled to pay. So, also, the near relationship between the parties; this tends to show nonpayment because it furnishes a reason why the plaintiff did not ask for the debt, or did not urge its payment. *As it seems to us, such matters as these become part of the plaintiff's task, but they are not conditions precedent to success. In the end, all he is bound to prove is nonpayment, and in fulfilling that obligation explanations or excuses are merely steps in the proof.* [Italics ours.]

The court then referred (R. 375-378) to a number of the cases relied on by the canal company in support of its contention that it was incumbent upon the United States to explain the delay in making demand for payment of the dividends and quoted typical language from one of them (*Sellers v. Holman*, 20 Pa. 321, 323-324). These cases in the main are the same as those now relied on by the canal company in this court. (Brief for the canal company, pp. 56-69.) Without discussing them in detail, they are, it is submitted, wide of the mark; they either involve the equitable defense of laches¹ (and so are doubly inapplicable here, since the present case was an action of assumpsit not involving equitable jurisdiction, and the United States, moreover, is not subject to the imputation of laches), or else they involve explanations or excuses for delay which had an *evidentiary* value on the question of payment or

¹ E. g., *Philippi v. Philippe*, 115 U. S. 151; *Bowman et al. v. Wathen et al.*, 1 How. 189; *Wagner et al. v. Baird et al.*, 7 How. 234. (Canal Company's Brief, pp. 56, 57, 58.)

nonpayment.^{1, 2} Cases of the latter type, far from justifying the deduction which the canal company draws from them, in reality support the position of the Government, approved both by the District Court and by the Circuit Court of Appeals, that its only obligation at the trial, aside from showing the original existence of the debt, was to prove that it had never been paid.³ Undoubtedly the correct rule on the subject is that stated by the Supreme Court of Pennsylvania in the very recent case of *Coleman v. Erie Trust Co.*, 255 Pa. 63 (1916), quoted in the opinion of the Circuit Court of Appeals (R. 376-377), but not referred to in the brief for the canal company. As four of the nine decisions cited by the company on this particular point (Brief, pp. 60-69) are from the State of Pennsylvania, this latest pronouncement of the Supreme Court of that State is specially apposite. The court said in the *Coleman* case, pp. 65-66:

¹ E. g., *Hillary v. Waller*, 12 Ves. Jr. 239; *Cope v. Humphreys et al.*, 14 Serg. & Rawle (Pa.) 15; *Miller v. Overseers of the Poor*, 17 Pa. Super. 159. (Canal Company's Brief, pp. 60, 62, 67.)

An exception, *Stover & Barnes v. Duren*, 3 Strob. (S. C.) 448 (Canal Company's Brief, p. 64)—where the position is taken that an acknowledgment or admission, in order to repel the presumption of payment, should be of such character as would suffice to take a case out of the statute of limitations—is clearly wrong.

² The canal company virtually admits (Brief p. 53) that the United States is not bound by laches, but insists that "the Government may lose its ability to prove its rights by reason of the neglect of its officers"—which, of course, is true but irrelevant, as no such loss occurred in the present instance. And in any event, there still could be no possible obligation on the part of the Government, notwithstanding such impaired ability, to prove unessential facts which had no bearing upon its right to a recovery. Necessarily, the evidence required in any case must bear some relation to the substantive law of the case. Yet the canal company, disregarding this

The presumption of payment arising from lapse of time is not conclusive, but is merely a *presumption of fact which is rebuttable*. "The presumption is rebutted or, to speak more accurately, does not arise, when there is affirmative proof * * * that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor." (*Reed v. Reed*, 46 Pa. 239, 242.) Further on in the same opinion Mr. Justice Strong said presumption from lapse of time "is only an inference that the debtor has done something to discharge the debt, to wit, that he has made payment. Hence it is rebutted by simple proof that payment has not been made. And the facts being established, whether they are sufficient to rebut it, is a question for the court, and not for the jury." In this instance

axiomatic proposition, seeks to make "legal procedure" (p. 53) and the rules of evidence do duty in lieu of the doctrine of laches which it is unable to invoke; it asserts in effect that an explanation of the delay is an *evidential necessity* and says that a case like this can not be presented with the requisite certainty, "when the presumption of payment has arisen, unless the delay has been satisfactorily explained." (Canal Company's Brief, pp. 53-54.) Such contention is obviously without merit (or, if permissible at all under the possible circumstances of some hypothetical case, is matter for argument to the jury); for an "explanation," which the plaintiff in error deems so imperative, could have no greater probative force in repelling the presumption of payment than clear-cut direct proof of nonpayment—certainly no such *exclusive* probative force as to preclude the latter. If the latter is not precluded and is in fact produced there could then be no *necessity* of explanations as evidence of nonpayment.

² A few excerpts, culled from the canal company's own quotations, will serve to reinforce the Government's position:

From *Hillary v. Waller* (12 Ves. Jr. 239) (quoted in the Canal Company's Brief, pp. 60-61), page 265-266:

The presumption in courts of law from length of time stands upon a clear principle; built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this; that a man will naturally enjoy what belongs to him. That is the whole principle. * * * It has been said, you can not presume, unless you believe. *It is, because there are no means of creating belief or disbelief, that such general*

there was affirmative proof that the judgment had not been paid, in the positive testimony of the plaintiff to that effect. The facts were not in dispute, and it was, therefore, for the court to say whether or not the judgment was a valid claim. In addition to the affirmative proof that the debt had not been paid, the cir-

presumptions are raised * * *. Therefore upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, instead of belief, which must be the foundation of the judgment upon a recent transaction, *where the circumstances are incapable of forming anything like belief*, the legal presumption holds the place of particular and individual belief. [Italics ours.]

From *Claim of Reside* (9 Op. Atty. Gen. 197) (quoted in the Canal Company's Brief, pp. 61-62), page 204:

* * * But the Government is bound, like anybody else, *by the rules of evidence and by the natural presumption arising from the facts of the case.* [Italics ours.]

From *Cope v. Humphreys et al.* (14 Searg. & Rawle (Pa.) 15), where the question was merely whether the trial judge had erred in not submitting a naked presumption of payment, unaccompanied by any rebutting circumstances, to the determination of a jury as an open question for their belief (quoted in the Canal Company's Brief, pp. 62-64), page 21:

* * * "The rule is in the nature of a statute of limitation, furnishing indeed not a legal bar, but a presumption of facts, and though not conclusive, yet prima facie evidence of it; *and therefore sufficient of itself to cast the burden of countervailing proof on the opposite party.* * * * The presumption is not subject to the discretion of a jury; they are bound, where it operates at all, to adopt it as satisfactory proof till the contrary appears." * * * *If there had been any circumstances, anything but the lapse of time to charge the jury on, that should have been left to the jury; but where there was none the presumption of law on that fact is, that the judgment was satisfied.* [Italics ours.]

From *Sellers v. Holman* (20 Pa. 321) (quoted in Canal Company's Brief, pp. 65-66), page 323:

The court below instructed the jury substantially, that two notes, one of which was more than thirty and the other upwards of twenty-seven years old before suit brought, must be presumed to have been paid, *unless that presumption was met by something more than a mere naked demand of the debt by the obligee within twenty years.*

The only fair objection to the charge is that the judge has defended his positions too well. The question was not worth a tithe of the labor and learning he bestowed on it. [Italics ours.]

From *Miller v. Overseers of the Poor* (17 Pa. Super. 159) (quoted in Canal Company's Brief, p. 67), page 160:

After a lapse of twenty years, mortgages, judgments and all debts, no matter how solemn the instrument evidencing them may be, are presumed to be paid. And such presumption stands until rebutted. [Italics ours.]

cumstances shown were such as to reasonably account for the delay. It appeared that the debtor was for years in straitened financial circumstances, and had but a small income, which would have been seriously disturbed had payment of the judgment been pressed. The relationship of father and son between the defendant and plaintiff was also a sufficient and natural reason for the delay of the latter in enforcing payment. [*Italics ours.*]

Assuming, however, that it were a part of the Government's duty to explain the delay in making demand for payment of its claim, such explanation appears from the evidence here just as in the *Coleman case, supra*. The peculations by the canal company's employees, their covering of their guilt by forging receipts and vouchers, and their deliberate withholding of notices advising the Government that dividends had been declared—notice having been sent on all former occasions—amply explain the long delay in suing for the debt.

A further question raised by the canal company should be here disposed of: At pages 54-56 of the company's brief the contention is made that the United States in becoming a stockholder of the company entered commerce and thereby descended from its sovereign position (p. 54) and that since it "can confer no rights upon the stock it holds, it must of necessity be confined to the rights which are vested in the stock itself, and those rights are the same for every other holder of stock in the same corporation" (pp. 55-56). Thence it is urged that "if every

stockholder must demand his dividends upon his stock within thirty-five years" or lose his right to them, "this must be true of all the shareholders, no matter who they may be" (P. 56). Conceding that the Government, when it becomes a suitor in one of its courts, is subject to the ordinary rules of procedure and evidence applicable to private litigants, this contention—designed to raise the *affirmative defense* of laches which the defendant did not raise at the trial, and which if raised would have been untenable—was sufficiently answered by the Circuit Court of Appeals in reviewing the first trial, where the same argument was advanced in reference to the statute of limitations. The court said (223 Fed. 926, 928):

* * * the fallacy of the company's argument seems to lurk in the assumption that in this action the Government is asserting a right in its character as a stockholder. Undoubtedly the right came into being because the Government owns the stock, but in no other respect has the suit anything to do with such ownership. The Government is not suing as a stockholder; it is suing as a creditor, and in this character alone is it now to be considered. The right set up is a right to recover a sum of money from the company, and could be urged quite as effectively by an assignee of the dividends, although he might never have been a stockholder at all.

II.

**THE EVIDENCE INTRODUCED BY THE GOVERNMENT TO SHOW
THAT THE DIVIDENDS SUED FOR HAD NEVER BEEN PAID
WAS COMPETENT FOR THE PURPOSE.**

The Canal Company's assignment of errors (R. 379 et. seq.) contains 12 assignments (Nos. 1 to 12, inclusive, R. 379-388) which question the correctness of rulings at the trial on matters of evidence.

Of these, No. 12 (R. 388) attacks the Government's right to introduce the forged receipts and vouchers found in the Canal Company's files (Gov. Exs. Nos. 11, 12, 13, 14, and 66, R. 287-289, 300) and to use certain photographs—not reproduced in the record (R. 290)—in proving that the papers were forgeries (R. 71, 95-97). Whilst this assignment is reprinted in the Canal Company's brief (p. 12) as one upon which the company relies in this court, no portion of the brief is addressed to the support of it, and it may be disregarded.

Assignments Nos. 1 to 11—of which No. 2 appears to be abandoned (Canal Company's brief, pp. 5-6)—all relate to the use of certain records of the Treasury Department (Gov. Exs. Nos. 78 to 91, inclusive) in connection with the testimony of the witness Pearson, an employee of the department (R. 200). They lay the foundation for the contentions made by the Canal Company in its brief (pp. 29, 37)—

(a) That the Treasury records used by Pearson were inadmissible for the purpose of showing, as evidence of nonpayment, the *absence* of any entries in them

indicating payment, although such entries should have appeared if the dividends had been paid; and

(b) That some of the records (Gov. Exs. Nos. 78 to 86, inclusive, and No. 91) were further incompetent because (the Canal Company asserts) they were not originals or certified copies of originals.

In order to discuss intelligently the competency of Pearson's testimony and the Treasury records to which he referred, it is desirable to have in mind what the Government had already proved:

It had proved that the money appropriated by the Canal Company for the payment of the dividends of 1873, 1875, and 1876 was embezzled by the officer of the company in charge of the fund and another employee of the company who conspired with him (R. 121 et seq., 137-139).

It had produced, from the files of the Canal Company, where they were found mixed with genuine vouchers for earlier dividends (R. 45-46, 53-54, 68), the following papers:

A paper purporting to be a paid draft dated October 26, 1874, drawn by J. F. Hartley, Acting Secretary of the Treasury, upon Henry V. Leslie, treasurer of the Canal Company, for the amount of the dividend of 1873 (R. 39; Gov. Ex. No. 12, R. 288); the Canal Company's dividend receipt book containing what purported to be a receipt dated October 30, 1874, for the amount of that dividend signed "Wm. Y. Beale," a fictitious name (R. 38, 136-138; Gov. Ex. No. 66, R. 300);

A paper purporting to be a letter to Henry V. Leslie, secretary and treasurer of the Canal Company, dated November 19, 1875, from the Treasury Department, signed "A. V. Holmes, Asst. Sec'y," a fictitious name (R. 177, 179-180), professing to acknowledge the receipt of a letter from the former dated November 17, 1875, containing a check of the same date for the amount of the dividend of 1875 (R. 40; Gov. Ex. No. 11, R. 287); also a pretended receipt from the Canal Company's receipt book for the amount of that dividend dated November 19, 1875, and signed "Henry V. Leslie, Atty." (R. 38, 136-138; Gov. Ex. No. 66, R. 300);

Also what purported to be a letter to Henry V. Leslie, secretary and treasurer of the Canal Company, from the Treasury Department, dated November 27, 1877, signed "Charles W. Hayes, Asst. Sec'y," a fictitious name (R. 177, 179-180), advising the company that a sight draft for the amount of the dividend of 1876 had that day been forwarded for collection to the Assistant Treasurer of the United States at Philadelphia (R. 42; Gov. Ex. No. 14, R. 289); also a paper purporting to be a paid draft, dated November 27, 1877, signed "Charles W. Hayes, Assistant Sec'y," for the amount of the dividend (R. 43; Gov. Ex. No. 13, R. 289); also a pretended receipt in the Canal Company's dividend receipt book for the dividend in question dated December 5, 1877, and signed "Wm. Y. Beale" (R. 38, 136-138; Gov. Ex. No. 66, R. 300).

It had shown that these papers were exhibited by the Canal Company to agents of the Treasury Department on at least three different occasions in 1913 and 1914 as the company's papers evidencing payment of the dividends (R. 46, 54, 67-68, 98-99). It had then shown that the papers were not genuine receipts and vouchers but were forged productions made and placed in the files of the company by the persons who had embezzled the company's funds (R. 58-60, 64-65, 69-75, 77-79, 90-97, 181, 129-136); and one of the participants in the crime (the other being dead, R. 139-140) had explained the forgeries, testifying that he and the treasurer of the company had withheld from the Government the customary notice of the declaration of the dividends and that to his personal knowledge the dividends had not been paid by the company prior to 1886 when he left the company's service (R. 125-137).

The Government had then shown that the Treasury Department had received due notice from the canal company of the declaration of all earlier dividends (fourteen in number), but that a thorough search of the department's files failed to disclose any notice of the dividends in suit. (R. 159-164; Gov. Exs. Nos. 67, 68, 69, R. 301, 309, 310.)

It had also shown that the Treasury Department had a complete record of the payment of these fourteen earlier dividends, beginning with the first, which was declared and paid in 1853, and ending with the fourteenth, which was declared in Decem-

ber, 1872, and paid during the following year. (R. 165 et seq., Gov. Ex. No. 92, R. 335, 340; Gov. Ex. No. 77, R. 317, 334.) It had shown by a qualified witness, Mr. O'Reilly, who had been more than twenty-one years in the service of the Government (R. 173), the manner in which the dividends that *were* paid had reached the Treasury and been accounted for, and in which those now sued for would normally have been paid and accounted for if they had in fact been paid. (R. 165-175.)¹

¹ O'Reilly, testified as follows, taking as an example the dividend of 1871 (R. 165-170):

A. Perhaps I should ask if the purpose is to have me take up the course which began with the receipt of the notice?

Q. Yes, certainly.

A. On the receipt of this paper [notice of the declaration of a dividend], which I understand is in evidence, the Treasury Department proceeded to draw a draft.

A. I am speaking now of a notice written on a letter head, reading "Office, Chesapeake and Delaware Canal Company, 417 Walnut Street, Philadelphia, October twenty-fifth, 1871."

Q. That is one of the notices produced by Mr. Collins?

A. Yes, sir; addressed to Honorable George S. Boutwell, Secretary of the Treasury, Washington, D. C.; and signed "Respectfully yours, Henry V. Leslie, Treasurer." (Exhibit No. 67, R. 301, 306.)

By the Court:

Q. He states the fact of the dividend and the amount?

A. Yes, sir. "The proprietors of this company have declared a cash dividend on the outstanding capital stock of the company of one dollar and fifty cents per share. The amount due the United States Government is twenty-one thousand nine hundred and thirty-seven dollars and fifty cents. This sum is now subject to your order, either by sight draft or otherwise. Respectfully yours, Henry V. Leslie, Treasurer."

Q. What was the order of events after that? What was done next?

A. The Secretary of the Treasury then drew a draft upon Henry V. Leslie, esquire, Treasurer of the Chesapeake and Delaware Canal Company * * *

At the same time a letter was written to the assistant treasurer. I am speaking now of the general course that was followed in this case.

Q. Written by whom?

It had produced from their proper custody in the Division of Public Monies of the Treasury Department the transcripts of account rendered by the

A. By the department and signed similarly, "J. F. Hartley, acting secretary," addressed to the Assistant Treasurer of the United States in Philadelphia, inclosing to him for collection the draft which the department had prepared and drawn upon the treasurer of the canal company. On receipt of that draft at the office of the Assistant Treasurer at Philadelphia—I might say that there were—although I am not prepared to say it was uniformly done, or that it was done invariably, but that it was generally done—a notice sent on the same day to Henry V. Leslie advising him of the drawing of the draft and the authorization of the Assistant Treasurer in Philadelphia for collection. On receipt of the draft at the office of the Assistant Treasurer at Philadelphia, presumably, it was presented to the company, and on the date of his presentation and the receipt by the Assistant Treasurer of the amount of the dividend, he would issue two certificates of deposit certifying that he had received the amount of that dividend as described, as representing money which was a dividend of the Chesapeake and Delaware Canal Company. Those certificates of deposit the Assistant Treasurer at Philadelphia would transmit to the Secretary of the Treasury, and at the same time he would prepare, or he would make an entry in his daily transcript of receipts at the office of the Assistant Treasurer at Philadelphia, in which the amount of the draft which he had collected—which sometimes was described specifically with date of the letter and date of the draft—would appear.

By Mr. BIDDLE:

Q. What would you call that?

A. A daily transcript of the accounts. I might explain that, that the situation is this: That all of the monies received by the Assistant Treasurers, throughout the United States, whether in Philadelphia, or elsewhere, are deposited to the credit of the Treasurer of the United States, because all public monies are subject to his draft, and, therefore, monies deposited in all of these places are placed to the Treasurer's credit, and the Assistant Treasurer reports that as money received in account with the Treasurer of the United States. That is the character of the daily transcript to which I have just referred.

On receipt of the daily transcript at the department and of the certificates of deposit, they were checked together to see that there was no omission from the daily transcript of any certificate of deposit which had been issued at any of the depositaries. That being verified, the certificates of deposit were made the basis of a list, known as a deposit list, that was prepared in the Division of Public Monies and forwarded to the Division of Bookkeeping and Warrants. At the time of this occurrence the division was known as the Division of Warrants, Estimates, and Appropriations.

On receipt of the deposit list containing the fund set out in the certificate of deposit, that Division of Warrants, Estimates, and Appropriations prepared a

Assistant Treasurer at Philadelphia to the Secretary of the Treasury, containing entries showing payment of all the 14 dividends declared by the canal

warrant which is known as a covering warrant, a formal cover for money into the Treasury for charge against the Treasurer of the United States. That fixed his accountability to the United States for monies received. Those warrants were registered in a register of the Division of Warrants, Estimates, and Appropriations and passed over to the Division of Public Monies for notation by them of the number and date of the warrant which took up and covered into the Treasury the amount represented by the various certificates of deposit. After the preparation of this warrant, it was signed by the Secretary of the Treasury, passed by him to the Comptroller of the Treasury, who is required by law to keep a duplicate set of books containing these matters, and he countersigned the warrant. The warrant then passed from the Comptroller to the Treasurer of the United States, who acknowledged at the bottom of the warrant the receipt of the sum of money named in the warrant. A warrant should show for each specific particular payment that was made. The treasurer then, at the expiration of the quarter in which these transactions occurred, prepared for submission and audit by the Auditor of the Treasury Department, his accounts of all monies received by him within the quarter, and also containing a claim for credit for all pay warrants that he had paid, money that he had disbursed within the same period.

That account was made up and bound in book form and transmitted by the Treasurer to the Auditor for the Treasury Department for examination and audit. On that the Auditor examined and settled the account and made a certificate of his balance due to the United States, based upon the warrants issued by the Secretary of the Treasury. The Treasurer's account, by entering the warrant account, was charged with all monies going into the Treasury by a covering warrant and credited with all warrants which he paid, that was issued by the Secretary of the Treasury and drawn upon the Treasurer of the United States.

By Mr. NIELDS:

Q. Were all the fourteen dividends paid upon draft such as you have described?

A. All were so paid.

Mr. C. BIDDLE. Only speak of what you know.

A. (continued). I know it from examination of the accounts and records. Of course, not from personal knowledge. All of the fourteen dividends were paid upon drafts drawn by the Treasury Department and sent to the Assistant Treasurer at Philadelphia for collection, with the exception of the second dividend, which was treated in a slightly different way. In that case the department having been advised of the declaration of a dividend in 1866, there having been none declared between 1853 and 1866, immediately instructed Mr. Leslie to deposit that amount with the Assistant Treasurer at Philadelphia; and that transaction was carried out in that manner, the letter of instructions being considered and accepted as a draft.

company prior to 1873 (R. 167-168, 183-184). It had shown by Miss Howgate, an employee of the Treasury Department since 1888 (R. 80), who produced these documents, that she had searched the files for certificates of deposit and transcripts covering the payments purporting to be evidenced by the papers taken from the canal company's files, but had been unable to find any (R. 184-186). The transcripts of account covering the dates in question were found and produced (Gov. Exs. Nos. 75, 76, R. 313, 315), but they contain no such entries. The Government had further shown by Miss Howgate that there is kept in the Treasury Department a record in which certificates of deposit issued by the Assistant Treasurer at Philadelphia are contemporaneously recorded as received, and that she had searched this record, covering the period from January, 1870, to December 31, 1877, but had found no entry of the receipt of dividends declared in 1873, 1875, and 1876. (R. 187.)

The Government had also shown by O'Reilly that he had examined all appropriate places in the Treasury Department in which a record should be found of the receipt of a check from the canal company of November 17, 1875, as purported to be shown by the papers taken from its files, and that no record of any such check could be found. (R. 172-173.)

The Government had produced the original covering warrants (Gov. Ex. No. 77, R. 317-334; 1 Stat. 66, §4; R. S. §305), by which the payments

for the 14 earlier dividends were formally covered into the United States Treasury and the Treasurer of the United States debited with their amount—these warrants having been prepared in the Division of Warrants, Estimates and Appropriations (now the Division of Bookkeeping and Warrants) from the certificates of deposit issued by the Assistant Treasurer at Philadelphia at the times when the dividends were paid, the certificates being first checked against the Assistant Treasurer's daily transcript of account to insure accuracy (R. 167-169, 195-197); and had also shown by Miss Brady who for more than 20 years past has been in charge of the files for the Auditor of the Treasury (R. 179), that she had searched for additional covering warrants for subsequent deposits of any sums of money on account of dividends paid by the canal company to the United States from May 9, 1873 (the date of the last of the 14 warrants), through the year 1877, but had found none; also that she had searched the quarterly accounts rendered and authenticated by the Treasurer of the United States, covering the same period (1 Stat. 65, 66, §4; R. S. §305, 311), in which should appear entries of the dividends if paid, but that no such entries were found. (R. 199.)

Having offered the foregoing evidence, all of which is unrefuted, and none of which, as above shown (p. 18), is seriously questioned by any assignment of errors, the Government introduced its last witness,

Pearson, an employee of the Treasury Department, who had been in its service since June, 1865 (R. 200), and who testified, by reference to certain records of the department, that they contained no entries showing payment of any of the dividends in suit from 1873 to the commencement of this action, although such entries should have appeared therein if the dividends had been paid.

The objections to Pearson's use of these records will now be considered. In our treatment of them we prefer to reverse the order in which they are presented by the canal company. (Brief, pp. 29, 37.)

FIRST. THE RECORDS USED BY PEARSON WERE AUTHENTIC PUBLIC RECORDS OF THE TREASURY DEPARTMENT, AND AS SUCH WERE COMPETENT EVIDENCE.

The canal company contends that the Treasury records (or some of them) to which Pearson referred in testifying were not originals or certified copies of originals, and that they were therefore inadmissible for any purpose (Brief, pp. 37-51). It concludes its discussion of this point with the statement (p. 51) that under the authorities cited "the reports admitted in this case were not shown to have any of the incidents of public documents; they are not the books of original entry, and therefore were inadmissible for any purpose." In answer to this, it may be confidently asserted that there are not, in the whole range of public documents, any records which bear more unmistakably the impress of their public character. (Constitution of the United States, Art. I, § 9, clause 7; 1 Stat. 65; R. S. §§ 305, 313; act of July 31, 1894, c. 174, § 10, 28 Stat. 208.)

The records concerning which Pearson testified are Government Exhibits Nos. 78 to 91, inclusive, certain books of the Treasury Department which are not reproduced in the record.

Of these, Nos. 87 to 90, inclusive, should be considered first. They were four volumes styled "Registers of Miscellaneous Revenue Warrants" (R. 245). They covered the period from July 1, 1872, to December 31, 1878 (R. 226-227; 245-246), and were produced by the witness from the Division of Bookkeeping and Warrants of the Treasury Department, where they were officially kept in his custody.¹ They were the original records (R. 246) in which were entered the warrants (prepared by the Division of Bookkeeping and Warrants, R. 168) by which all miscellaneous revenues of the United

¹ They were actually made, however, in the office of the Register of the Treasury, for R. S., § 313 (since repealed by the act of July 31, 1894, c. 174, §10, 28 Stat. 208, commonly known as the Dockery Act), made it the duty of the register—

First. To keep all accounts of the receipts and expenditures of the public money, and of all debts due to or from the United States. * * *

Third. *To record all warrants for the receipt or payment of moneys at the Treasury, and certify the same thereon*, except those drawn by the Postmaster General, and those drawn by the Secretary of the Treasury upon the requisitions of the Secretaries of the War and Navy Departments.

The Dockery Act, of July 31, 1894, c. 174, §10, repealed R. S., § 313, and provided (§10):

"The Division of Warrants, Estimates, and Appropriations in the office of the Secretary of the Treasury is hereby recognized and established as the Division of Bookkeeping and Warrants. It shall be under the direction of the Secretary of the Treasury as heretofore. *Upon the books of this division shall be kept all accounts of receipts and expenditures of public money*, except those relating to the postal revenues and expenditures therefrom; and section three hundred and thirteen and so much of sections two hundred and eighty-three and thirty-six hundred and seventy-five of the Revised Statutes as require those accounts to be kept by certain auditors and the Register of the Treasury are repealed." (28 Stat. 208.)

States are formally covered into the Treasury of the United States and the United States Treasurer charged with accountability therefor to the United States (R. 168, 245-246).

Pearson testified that dividends on stock owned by the United States are classed as miscellaneous revenues (R. 228), and that these four volumes of "Registers of Miscellaneous Revenue Warrants" should contain entries of warrants covering the receipt of dividends, if any, paid by the canal company to the United States during the period to which the volumes relate (1872-1878); that they did contain entries showing payments of the thirteenth and fourteenth dividends (declared in June and December, 1872, and paid respectively in November, 1872, and May, 1873, Govt. Ex. No. 77, R. 317, 331, 333), but contained no entries showing the receipt by the Government of any subsequent dividends from the canal company. (R. 247, 251-253).

The witness testified that it was his duty, among others, to prepare and record the receipt covering warrants of the department. Whether he made the particular volumes of registers here in question does not positively appear from the record, but the testimony amply supports the inference that he did so. He testified that since 1868 he had not lost a day from the Treasury Department (R. 205), and that at that time he was employed on the books of the register's office. He was transferred to the division of bookkeeping and warrants in 1895 (R.

205)—the time when that division took over the work formerly done by the register's office.

These books were kept pursuant to law and official regulations.

From the foundation of the Government the statutes of the United States have required that receipts and disbursements of the Treasury shall be upon warrants signed by the Secretary of the Treasury, and that without such warrants, so signed, no acknowledgment for money received into the public treasury shall be valid.¹ (Act of Sept. 2, 1789, 1 Stat. 65, §4; R. S. §305.)

R. S. §305, which was in force at the time when the exhibits complained of were made, remains the law at the present time, except that so much thereof as required the Register of the Treasury to record the warrants mentioned in the section was repealed by the Dockery Act of July 31, 1894, c. 174, §11, 28 Stat. 209, and with the further exception that the office of second comptroller was abolished and the designation of the first comptroller changed to

¹ R. S. §305 (Comp. Stat., 1916, §478), which is derived from the act of September 2, 1789, c. 12, §4, provides as follows:

"The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by either comptroller, and recorded by the register, and not otherwise. He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment for money received into the public Treasury shall be valid. He shall render his accounts to the first comptroller quarterly, or oftener if required, and shall transmit a copy thereof, when settled, to the Secretary of the Treasury. He shall at all times submit to the Secretary of the Treasury and the first comptroller, or either of them, the inspection of the moneys in his hands."

Comptroller of the Treasury and he was to perform the duties of the office of second comptroller (28 Stat. 209, §4).

At the time when Exhibits 87 to 90 were made, R. S. §313 (since repealed, *supra*, p. 28, note), was in force, and provided:

SEC. 313. It shall be the duty of the Register:

First. To keep all accounts of the receipts and expenditures of the public money, and of all debts due to or from the United States.

* * * *

Third. To record all warrants for the receipt or payment of moneys at the Treasury, and certify the same thereon, except those drawn by the Postmaster General, and those drawn by the Secretary of the Treasury upon the requisitions of the Secretaries of the War and Navy Departments.

* * * *

The law also provided, and still does (R. S., §305), that—

The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, * * *. *He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment of money received into the public Treasury shall be valid.*

[Italics ours.]

Exhibits 87 to 90 were made pursuant to these statutes. As they were the original records of the warrants which afford, as it were, the only ingress to the Treasury, they may properly be regarded as the original fiscal records of the Government. And as they were brought direct from their proper custody in the Treasury Department by the employee of the department in charge of them, there can be no question as to their authenticity.

In addition, it is provided by Revised Statutes, §236 (derived from the early act of Mar. 3, 1817, c. 45, §2, 3 Stat. 366) that—

All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.

Under this statute and Revised Statutes, section 305, *supra*, any payment made by the canal company to the Government would of necessity appear in the Registers of Warrants. What becomes, then, of the canal company's suggestion (Brief, pp. 39-40) that these records should have been rejected and that the Government might have produced better records, as, for example, the books of the subtreasury at Philadelphia? Indeed, in view of the statutes which govern the Treasury Department's system of accounting, it may be asked, What becomes of the presumption of payment of the dividends here in suit?

Could they have been paid without a permanent record being made?

But in addition to Exhibits 87 to 90 being clearly admissible as the most original evidence that could have been adduced, their admissibility rests upon a still broader base—the fact that they are public records. This characteristic they share in common with the other exhibits referred to by the witness Pearson, which we now take up.

Government Exhibits Nos. 78 to 86, inclusive, comprise nine printed volumes. They were entitled "Receipts and Expenditures of the United States" (R. 211). They were produced by the witness from the Division of Bookkeeping and Warrants, where they were kept in his official custody (R. 211–213). They are compilations year by year from 1872 to 1914, inclusive, of the receipts and expenditures of the Government (R. 225–226; 229–230). The witness had assisted in making them (R. 213, 214). They were made from entries in the Register of Warrants (R. 225–226; 229–230), one particular series of which, namely those covering miscellaneous receipts, has just been described. As Exhibits Nos. 78 to 86 include not only miscellaneous receipts but also other classes of the public revenues, and expenditures as well, they are of course drawn from a wider range of registers than the "Registers of Miscellaneous Revenue Warrants," *supra*. As every receipt or disbursement of the Treasury, however, must be evidenced by a warrant as already shown,

and as by requirements of law these warrants must all be registered in the Division of Bookkeeping and Warrants (Act of July 31, 1894, c. 174, §10, *supra*) the division has the necessary original data from which to make complete and authoritative compilations of the Government's receipts and expenditures. The compilation for each year is entitled "Combined Statement of the Receipts and Disbursements (apparent and actual) of the United States for the Fiscal Year ended June 30," etc. (R. 202, 367), and is preceded by a letter from the chief of the division to the Secretary of the Treasury (R. 235, 368), which declares that the compilations contain—

* * * The receipts and disbursements of the Government by appropriations, exclusive of the principal of the public debt, for the fiscal year ended June 30, * * * exhibiting the various sources of the revenues, the apparent expenses of each branch of the service under the several departments, and of each department on account of "Salaries," "Ordinary expenses," "Public works," "Miscellaneous," and "Unusual and extraordinary"; and the actual expenses of the same and the *actual* revenues, by deduction from them of those items which appear in both accounts by requirements of law, but which are not *actual revenues* or *true expenditures* and other items on account of branches of the service intended to be self-supporting, the expenses and revenues of which must by law enter to the account of the Treasury.

It appears further that these printed compilations are the statements which the Secretary of the Treasury transmits annually to Congress. (R. 213, 236, 368; 1 Stat. 65, 66; 26 Stat. 511.)

Pearson testified that these books should properly contain entries showing the receipt by the Government of payments of dividends, if the payments had in fact been made (R. 230, 228); that he had examined the books for the purpose of ascertaining any such entries for the dividends of 1873, 1875, and 1876, and that none were found. (R. 245.)

Finally, Government Exhibit No. 91 is a compilation of *all* the Government's miscellaneous receipts from the year 1791 brought together under appropriate headings, such as "Conscience fund," etc. (R. 229; 227-229; 247-248; 250.) Like the other exhibits referred to by the witness, the book was produced by him from the division of bookkeeping and warrants, where it is kept in his official charge. Its function is to facilitate the expeditious answering of inquiries (R. 228, 248). It was compiled—in part by the witness (R. 228)—by making postings from the annual compilations of receipts and expenditures already mentioned (R. 259). The witness's testimony justifies the inference, also, though this does not certainly appear, that the entries in Exhibit 91 are also checked against the entries in the original registers of warrants from which the annual compilations are made (R. 247-252). As already shown, dividends on stock held by the Government are classed as mis-

cellaneous revenues (R. 228), and Exhibit 91 contains an appropriate heading under which are entered dividends on stock held by it in the Chesapeake & Delaware Canal Company (R. 254). The witness testified that the book would normally contain "an entry showing a receipt by the United States of any payment on account of dividends by the Chesapeake & Delaware Canal Company after June 1, 1873" (R. 250, 251-253). There is, however, no such entry (R. 250), although entries appear covering all the fourteen earlier dividends. (R. 258.)

The canal company insists that these exhibits are not public documents and not books of original entry (Brief, pp. 39-40, 48-51). And at the trial they were referred to by counsel for the company as "a registry only of the private affairs of this Government, and not in any sense public documents." (R. 231.) The fallacy of the company's position thus consists in an attempt to force these records into the narrow limits of the law respecting "shop books." In reality they are not shop books and were not offered as such (R. 235-236), but are public records of the very highest order, deriving their character as such from the Constitution itself, and from statutes running back to the beginning of the Government.

The Constitution, Article I, section 9, clause 7, provides that—

No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

It would be strange indeed if the records of the Treasury Department published under this high sanction are, as alleged by the canal company, nothing but a "registry of the private affairs of this Government" (R. 231). No analogue of the requirement that regular statements and accounts of the Treasury shall from time to time be published is to be found elsewhere in the whole Constitution save in the provision of Article I, section 5, which provides that "each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy * * *." A little reflection demonstrates the fundamental importance of the requirement, and the evils which might result if it had been omitted from the Constitution.

Tucker, in his work on the Constitution, says in reference to it, volume 2, page 664:

The last provision of this clause was fully commented on in the convention: That the people by *public reports* from time to time should be made aware of the collections of money as well as its disbursement.

At the first session of Congress, and among the first acts passed, Congress vitalized the provision by providing (Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65):

That it shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit;

to prepare and report estimates of the public revenue, and the public expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts and making returns * * *; *to make report and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office * * *.*" [Italics ours.]

The act of September 2, 1789, was supplemented by various other statutes, some of which became embodied in Revised Statutes, § 257. And later statutes have made the duty of the Secretary of the Treasury to prepare and render these annual compilations still more definite. Thus, by act of September 30, 1890, c. 1126, § 1, 26 Stat. 511 (the deficiency appropriation act for the fiscal year 1890), Comp. Stat., 1916, § 387, it was provided:

Hereafter the Secretary of the Treasury shall include in his annual report, in the statements of actual and estimated receipts and expenditures of the Government, the revenues from and expenditures on account of the Postal Service.

By another statute (Act of July 31, 1894, c. 174, § 15, 28 Stat. 210, the Dockery Act, already referred to), Comp. Stat. 1916, § 388, it is provided:

It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof,

an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation.

The statutes cited and the course of administrative practice under them establish beyond any question the true nature of the exhibits referred to by the witness Pearson, even if the language of the Constitution did not suffice to do so. Nor could it be reasonably asserted that because Exhibits 87 to 90 and Exhibit No. 91 were not, like Exhibits Nos. 78 to 86, inclusive, transmitted to Congress, they are therefore to be differentiated from the latter. All are in *pari materia*; all are necessary adjuncts to the conduct of the public fiscal business of the Government in keeping with the requirements of law.

Again, it can hardly be supposed that these records of the Treasury Department, made pursuant to the direct mandate of the Constitution and supplementary statutes are to be accepted as public documents by Congress and the executive branch of the Government, yet rejected as public records by the courts.

The language of the Circuit Court of Appeals, we think, expresses the correct judicial attitude. That court said (R. 372-373):

We shall not discuss at length the question whether the ten exhibits complained of were

admissible evidence. They did not need to be certified; they were not copies, but were themselves the records kept in the Treasury, and their authenticity is not denied. In our opinion, they were competent evidence. We understand the general rule to be, that when a public officer is required either by statute or by the nature of his duty to keep records of transactions occurring in the course of his public service, the records thus made either by the officer himself or under his supervision are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination.

As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and moreover are made in the discharge of a public duty and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are *prima facie* evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. As the records concern public affairs, and do not affect the private interest of the officer, they are not tainted by the suspicion of private advantage.

The competency of the class of evidence here involved is also fully recognized by this court. *Bryan et al. v. Forsyth*, 60 U. S. (19 How.) 334, 338; *Gregg v. Forsyth*, 65 U. S. (24 How.) 179; *Post v. Supervisors*,

105 U. S. 667, 670-671; *Oakes v. U. S.*, 174 U. S. 778, 793, 796; *Holt v. United States*, 218 U. S. 245. In the last case it was stated (p. 252):

The witness relied in part upon the correctness of official maps in the Engineer's Department made from original surveys under the authority of the War Department, but not within his personal knowledge, and he referred to a book showing the titles to Fort Worden compiled under the same authority. The documents referred to are not before us, but they properly were introduced, and so far as we can see justified the finding of the jury, * * *.

The foregoing passage is unambiguous, not equivocal as the canal company suggests (Brief, pp. 41-42); it is clear that the court was referring as well to the maps and books as to the deeds which it had previously mentioned.

In *Oakes v. United States*, *supra*, where the question was (p. 793) whether the Court of Claims had erred in reaching findings of fact by reference to certain papers in the Confederate Archives Office, this Court said (p. 796):

It would be an anomalous condition of things if records of this kind, collected and preserved by the Government of the United States in a public office at great expense, were wholly inadmissible in a court of justice to show facts of which they afford the most distinct and appropriate evidence, and which, in the nature of things, can hardly be satisfactorily proved in any other manner.

To the same effect see:

Stewart v. United States (C. C. A. 9th), 211 Fed. 41; *Wigmore on Evidence*, vol. 3, sec. 1684.

In view of what has been already shown, the authorities relied on by the canal company (Brief, pp. 40-51) require no extended consideration. They bear only a remote resemblance to the present case and are readily differentiated. In *Marks v. Orth*, 121 Ind. 10 (canal company's brief, p. 42), the document or pamphlet referred to as inadmissible was rejected *on the ground that there was no proof of its authenticity*; that case, therefore, has no relevancy here. The exhibits in this case were produced directly from their official custody, so that no question of authenticity can arise. *United States v. Pinson*, 102 U. S. 548 (canal company's brief, pp. 43-44), also, is not in point; it merely involves consideration of the statutory methods prescribed for the adjustment of accounts between the Treasury Department and fiscal officers of the Government. So with *Mercer v. Dunn*, [1904] 2 Chancery, 534 (canal company's brief, p. 49): There the documents which were tendered in evidence and rejected were "confidential reports" which the court thought dangerous to admit as evidence of public rights. In *Hegler v. Faulkner*, 153 U. S. 109 (canal company's brief, p. 50), the list referred to was not a record "intended as a mode of preserving the recollection of facts"—the antithesis of the situation here. Again, in *Cushing v. Nantasket*

Beach Railroad, 143 Mass. 77 (canal company's brief, pp. 50-51), involving the question of a printed document entitled "48 Congress; 1st session; Senate Ex. Doc. No. 74," its exclusion from the evidence was on the ground of its irrelevancy to the issues.

SECOND. GOVERNMENT EXHIBITS NOS. 78 TO 91, INCLUSIVE, WERE COMPETENT TO SHOW BY THE ABSENCE OF ENTRIES THEREIN THAT THE DIVIDENDS SUED FOR HAD NOT BEEN PAID.

It only remains to inquire whether Exhibits Nos. 78 to 91, inclusive, were competent not only for the purpose of showing entries, but for the further purpose of showing by the absence of entries therein that the dividends sued for were never paid. In view of the nature of the records, and of the statutory requirement pursuant to which records must have been made if there had been payments, this question would seem to answer itself.

The rule applicable to the proof of facts by reference to the absence of entries is stated as follows by Wigmore in his work on Evidence, volume 3, section 1633 (6):

Since the assumption of the fulfillment of duty is the foundation of the exception (public document exception to hearsay rule), it would seem to follow that if a duty exists to record certain matters when they occur, and if no record of such matters is found, then the absence of any entry about them is evidence that they did not occur; *or, to put it in another way, the record taken as a whole, is evidence that the matters recorded, and those only, occurred.* [Italics ours.]

To the same effect are: *Chamberlayne*, *Modern Law of Evidence*, volume 3, section 1758; 16 *Encyclopedia of Law and Procedure*, 1120-1121, where the proposition is deduced from many cited cases; *United States v. Teschmaker et al.*, 63 U. S. (22 How.) 392, 405; *American Surety Co. v. Pauly*, 72 Fed. 470, 478, and *Knapp v. Day*, Col. (1893), 34 Pac. 1008.

Where, as here, the records produced are official records kept pursuant to law, the rule that they are competent to show by the absence of entries, the nonexistence of a state of facts which they should show if the facts had really occurred, is an inevitable corollary of the presumption of regularity that attached to the performance of official duty. (*Chesapeake & Delaware Canal Co. v. United States*, 240 Fed. 903, C. C. A. 3d; R. 373.)

The canal company, referring to the case of *United States v. Teschmaker*, 63 U. S. 405 (Brief, pp. 29-30), states that "the plaintiff produced a paper which recited it had been placed upon the record" and that the court properly "permitted the record to be produced to show that such statement was untrue." Such was the situation in the trial of this case: The existence of the forged papers in the canal company's files challenged the records of the Treasury Department; the very *presumption of payment* challenged the department's records, for by the Federal Statutes a payment of money to the United States could not occur without a corresponding record. The Government was entitled to accept the challenge.

III.

THE GOVERNMENT INTRODUCED EVIDENCE WHICH CLEARLY SHOWED THAT THE CLAIM IN SUIT HAD NOT IN FACT BEEN PAID. THE VERDICT OF THE JURY AND THE FINDING OF THE CIRCUIT COURT OF APPEALS ARE CONCLUSIVE.

Assuming its competency, the only remaining inquiry is whether the evidence was sufficient to justify the verdict of the jury.

The District Court, in refusing the canal company's request to direct a verdict for the defendant (R. 263, 266) and in denying its application for a new trial (R. 5), answered this question in the affirmative.

The Circuit Court of Appeals, after an exhaustive summary of the evidence,¹ expressed itself as follows (R. 378):

* * * concerning the present record we shall say nothing more, except that *a careful*

¹ The Circuit Court of Appeals summarized the evidence as follows [R. 366-372, 378]:

* * * On the second trial the Government offered additional evidence to the following effect:

That fourteen dividends had been declared before 1873, and had been paid to the United States; that the company had given due notice of these dividends—the notices themselves and copies of the Government's replies being produced by the Treasury; and that no notices of the dividends in question were on file in the Department [R. 54, 159-164, 183; Gov. Exs. Nos. 67, 77]:

That, after the beginning of the suit, a Government agent had examined the company's books and papers, and had discovered on its files forged vouchers for these three dividends purporting to be signed by an officer of the United States; and had discovered also forged receipts therefor on the dividend-receipt books—these facts being explained by a witness, formerly in the company's service, who testified that he had been a party to these forgeries, and that he and the company's treasurer had embezzled a large sum of money during the years in question; that no notices of these dividends had been sent to the United States, and that no payment thereof had been made by the company before he left the company's service in 1886. [R. 46-58, 68, 121-130.].

It was also testified by witnesses employed in the Treasury, that certain books (produced at the trial) were kept officially in the department, and

study has satisfied us not only that the trial judge could not properly have directed a verdict for the company but also that the evidence carries clear

contained entries relating to public moneys during the period from 1872 to 1914; that in the usual course these books would, or at least should, contain entries relating to money paid into the Treasury from any source whatever, but that no entry of the dividends in question appeared therein. These books were nine in number (Exhibits 78 to 86), and were labeled "Receipts and Expenditures of the United States" for such and such a year. The volumes contain separate annual statements, printed by the Public Printer, each entitled "Combined Statement of the Receipts and Disbursements (Apparent and Actual) of the United States for the fiscal year ended June 30," etc.; and each is preceded by a letter to the Secretary of the Treasury from the chief of the Warrant Division, which declares that the statement contains:

"* * * the receipts and disbursements of the Government by appropriations, exclusive of the principal of the public debt, for the fiscal year ended June 30, * * * exhibiting the various sources of the revenues, the apparent expense of each branch of the service under the several departments, and of each department on account of 'Salaries,' 'Ordinary Expenses,' 'Public Works,' 'Miscellaneous,' and 'Unusual and Extraordinary,' and the actual expenses of the same and the actual revenues, by deduction from them of those items which appear in both accounts by requirements of law, but which are not actual revenues or true expenditures, and other items on account of branches of the service intended to be self-supporting, the expenses and revenues of which must by law enter to the account of the Treasury"—

these statements being officially forwarded by the Secretary to the chairman of the Appropriations Committee of the House of Representatives. [R. 213, 235-236, 257.]

Four other books were offered (Exhibits 87 to 90), each labeled:

"Register of Revenue Covering Warrants

"Miscellaneous

"Secretary of the Treasury

"Warrant Division"—

and these were identified as the original registers for 1872 to 1878, inclusive.

One other volume (Exhibit 91), labeled:

"Receipts of the United States

"1791—

"Register's Office, Treasury Department—

was identified as containing a record of all the Government's miscellaneous receipts from 1791 to date, this being the class of receipts in which dividends on stock owned by the United States would appear. [R. 227-228, 247, 250-251, 252, 258.]

Of these fourteen volumes, Nos. 87-90 are originals, and the other ten are compilations of receipts and expenditures, but all of them are official books kept in the department and purport to contain records of all the money from

conviction that the dividends in question have never been paid. That the money was stolen by the company's trusted servants is its

every source that had been covered into the Treasury. They contain entries of the fourteen dividends paid by the Canal Company before 1873, but contain no entry of the dividends in dispute.

The defendant offered no evidence, and the court submitted the question whether on the plaintiff's showing the presumption of payment had been rebutted, and whether the company had in fact paid the sums sued for. The verdict was in favor of the Government, and the company assigns for error the admission of certain evidence, and the giving of certain instructions. The evidence complained of is the ten books already referred to, and in order to understand the situation clearly it will be desirable to state more fully the method by which the dividends in question should have reached the Treasury in the usual course of events. [R. 165-170.]

Normally, this would have happened: After a dividend had been declared, a notice thereof would have been sent to the Treasury by the company, stating that the amount due was subject to the Government's order, either by draft, or otherwise. The Secretary would then have drawn at sight upon the company's treasurer, and the draft would have been sent for collection to the Assistant Treasurer of the United States in Philadelphia, the company probably being notified that the draft had been forwarded.

Thereupon the draft would have been presented, and would have been paid either in cash or by check. The Assistant Treasurer would then have issued two certificates of deposit, specifying that he had received this particular payment from the company, and would have transmitted these certificates to the Treasury, at the same time charging himself therewith in his own daily account of receipts. The other party to this account is the Treasurer of the United States, all public moneys being subject to his draft, and for this reason the dividend would have been deposited to the Treasurer's credit, and the Assistant Treasurer would have reported it to Washington as money received by him in account with the Treasurer. After the certificates of deposit and the Assistant Treasurer's daily transcript of account had reached Washington they would have been examined and checked to see that they agreed, and the certificates would then have been made the basis of a deposit list, the list being prepared by the Division of Public Moneys and passed to the division then known as the Division of Warrants, Estimates, and Appropriations—afterwards, the Division of Bookkeeping and Warrants. After this division had received the list containing the items fully set out in the certificates, a warrant would have been prepared formally covering the money into the Treasury, thereby charging the Treasurer of the United States, and fixing his accountability therefor. This covering warrant would have been registered in the Division of Warrants, Estimates, and Appropriations, and would have been passed over to the Division of Public Moneys so that the number and date of the warrant might there be noted.

grievous misfortune, but this is undoubtedly the fact, and the loss must rest where it has fallen. [*Italics ours.*]

Moreover, the covering warrant (signed by the Secretary of the Treasury) would have been passed to the Comptroller of the Treasury, who is required by law to keep a duplicate set of books in reference to these matters. The Comptroller would have countersigned the warrant, and passed it in turn to the Treasurer of the United States, who would have acknowledged thereon the receipt of the particular money described therein. At the end of the quarter the Treasurer would have submitted to the Auditor of the Treasury an account of the moneys received by him during the quarter, and of his disbursements during the same period. These accounts of the Treasurer are in book form, and are examined and settled by the Auditor, who certifies the balance due by the Treasurer to the United States, charging him with the covering warrants issued by the Secretary of the Treasury, and crediting him with all payments made upon warrants drawn on him by the Secretary. The books of the department show that drafts were drawn for thirteen of the fourteen dividends referred to and were paid to the Assistant Treasurer at Philadelphia, reaching the Treasury in the manner described. No draft was drawn for the fourteenth (the dividend of 1866), but this was deposited directly with the Assistant Treasurer in Philadelphia by the company's treasurer. [R. 165-170.]

The course of accounting just described is commanded by the Federal statutes. Exhibit 91 was compiled from Exhibits 78 to 86, which (as already stated) are combined statements of receipts and disbursements by the Treasurer of the United States, made up in the Division of Bookkeeping and Warrants and sent to the Secretary of the Treasury. The fourteen dividends referred to were all paid in Philadelphia and were entered on the books of the Subtreasury in that city. The ten exhibits now under consideration are not books of original entry in the ordinary sense of that phrase; except in part, they had not been prepared by the witnesses that testified about them; and they were not certified as copies of original documents. It was further testified that all the exhibits had been thoroughly examined, but that no entry had been found therein of any of the dividends in question [i. e., those sued for], although such dividends should have appeared if they had been paid. [R. 245, 247, 250-251.]

This is the evidence that was offered to rebut the presumption of payment—the Government relying on the testimony of the company's guilty employee, on the absence of entries in the Treasury's books, and on the evidence concerning the earlier dividends.

* * * Concerning the present record we shall say nothing more except that a careful study has satisfied us, not only that the trial judge could not properly have directed a verdict for the company, but also that the evidence carries clear conviction that the dividends in question have never been paid. That the money was stolen by the company's trusted servants, is its grievous misfortune, but this is undoubtedly the fact, and the loss must rest where it has fallen. [*Italics ours.*]

In such circumstances, it is submitted that the fact of the nonpayment of the dividends is concluded here, especially as there was no evidence whatever (except the presumption operating as evidence) which even tended to contradict the Government's showing. The case is clearly within the rule stated by Mr. Justice Day in *Baker v. Schofield*, 243 U. S. 114, where he said (p. 118):

Our consideration of the evidence must be governed by the well-settled rule in this court that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous. *Stuart v. Hayden*, 169 U. S. 1, 14; *Baker v. Cummings*, 169 U. S. 189, 198; *Towson v. Moore*, 173 U. S. 17, 24; *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, 412; *Dun v. Lumberman's Credit Association*, 209 U. S. 20, 23; *Texas & Pacific Ry. Co. v. Railroad Commission of Louisiana*, 232 U. S. 338, 339.

To the same effect are: *Compania de Navigation v. Brauer*, 168 U. S. 104, 123; *Washington Securities Co. v. United States*, 234 U. S. 76, 78; *Gilson v. United States*, 234 U. S. 380, 383; *Wright-Blodgett Co. v. United States*, 236 U. S. 397, 402; *Villaneuva v. Villaneuva*, 239 U. S. 293, 298, and *Causey v. United States*, 240 U. S. 399, 401.

But even if there were no such rule, this court, it is submitted, would concur in the finding of the jury and of the judges of the Circuit Court of Appeals. The main links in the chain of evidence on which

the conclusions of the two lower courts are based have already been set forth in discussing the competency of the testimony of the witness Pearson and of the Treasury records to which he referred (*supra*), and need not be repeated.

Some further reference may be made, however, to the testimony of the witness Wilson (R. 116-154). He testified that he entered the employ of the Canal Company in 1855 (R. 116) and left its service in 1886 (R. 117); that his duty, among others, was to collect drafts, deposit funds, fill in the amounts and dates in the company's dividend receipt book, help keep various accounts, etc. (R. 117-119); that he and Leslie, the secretary and treasurer of the company, had embezzled the funds of the company to such an extent that in 1873 there was not sufficient money to pay the dividend of that year on the stock held by the Government; that their misappropriations and the consequent shortage of funds continued, and that the dividends for 1873, 1875, and 1876 remained unpaid; that no notices were sent to the Treasury Department, as had been done before, advising it of the declaration of the dividends (R. 125-126); that instead Wilson and Leslie, aided by a friend, had prepared the false vouchers already referred to, designed to evidence payment of the three dividends, and that he (Wilson) had certain knowledge that none of them had been paid "out of the Chesapeake & Delaware Canal Company's funds before or prior to 1886" because he had knowledge of all the payments that were made at the time (R. 137-138).

When asked on cross-examination whether Leslie may not have paid the amount of the dividends to the Government "out of his own funds which he took" the witness answered (R. 150), "I do not see how he could possibly do it, or where he would get the money to do it with. * * * Some of it I know just exactly where it went * * *."

In 1886 Wilson fled and left behind him a confession and a statement of liabilities of the company; the debts due to the United States were not included, however (R. 144-145). In this connection it should be observed that the Canal Company asserts in its brief, page 24, that the company "made a general settlement * * * with all the people who were known to have been defrauded" and argues, page 28, that for aught Wilson knew "the debt may have been paid at the settlement that was made of his embezzlements in 1886." Aside from the fact, to which Wilson testified positively, that he was sure he had not included in his statement the debts due to the United States (R. 144-145), the circumstance that the company made a general settlement with its creditors, if true, nowhere appears from the present record. The Canal Company offered no evidence, but relied solely upon the naked presumption of payment. The presence in its files of the forged vouchers and receipts, under the circumstances already disclosed, and its presentation thereof to an agent of the Government as late as May, 1914, as evidence of pay-

ment, belies, moreover, the supposition of a "settlement."

The Canal Company, apparently making a virtue of necessity, calls attention "to the fact that there is no conflict of testimony," and states that "the greater part of the record is composed of evidence taken on the part of the plaintiff to establish a fact that was not disputed by the defendant." (Brief, p. 23.) It urges, however, that "*the evidence of Wilson is not evidence to rebut the presumption of payment which arose by reason of the lapse of twenty-six years after the period covered by his testimony.*" (Brief, p. 24.) The answer to this contention is that the direct testimony of Wilson was only a part of the Government's chain of evidence covering the entire period from 1873 to 1914. His testimony can not be considered apart from the fact that the receipts and vouchers which he helped to fabricate remained in the files of the company, mixed with the genuine receipts and vouchers for earlier dividends, or from the further fact that these forged papers were exhibited by the company (in good faith, it may be conceded) to the agents of the Government in 1913 and 1914 as its evidences of payment. The significance of the situation thus disclosed is in no wise impaired, but is heightened, rather, by the circumstance that the Canal Company did not itself choose to rely upon the documents at the trial of the case. Of course it could not do so. As admitted in the company's brief,

the facts were indisputable. The mere presence of the papers in the company's files for upward of thirty-five years told a mute story of nonpayment, and a continuing one; Wilson's testimony merely gave it vocal utterance. Absence of any receipts to evidence payment might have been equivocal; but the presence in the files of the forged receipts and vouchers along with the genuine ones for all the fourteen earlier dividends (Hall, R. 44-46) was unequivocal and conclusive.

The foregoing evidence demonstrates, it is submitted, that the Government proved nonpayment of its claim, not alone by a preponderance of the evidence, which would have sufficed, but to a moral certainty and beyond any reasonable doubt. Indeed, it is difficult in the face of the obvious fact of the nonpayment of these dividends, which pervades this case at every turn, to treat with seriousness the Canal Company's contention that the eyes of the Court should be blinded to the fact and that the presumption of payment should be applied.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

G. CARROLL TODD,

The Assistant to the Attorney General.

LINCOLN R. CLARK,

Attorney, Department of Justice.

JANUARY, 1919.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

CHESAPEAKE & DELAWARE CANAL COM-
pany, plaintiff in error,

v.

THE UNITED STATES OF AMERICA.

No. 192.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN ANSWER TO SUPPLEMENTARY BRIEF FILED BY PLAINTIFF IN ERROR.

The supplementary brief of the Canal Company is primarily a discussion of the question whether the United States is to be regarded, for the purposes of this case, as clothed in its sovereign capacity, or whether it is to be considered as having divested itself of its sovereignty by entering the domain of commerce. (Proposition "A," supplementary brief, p. 1.)

Such a discussion is not, we think, germane to any issue before this court, its only possible relevancy being in the bearing it is alleged to have upon the further question, *which is not an issue here*, whether the Government's suit for unpaid dividends was

subject to the bar of a State statute of limitations. (Proposition "B," supplementary brief, pp. 1-2.)

As explained in the Government's main brief, pages 1-3, this case has been twice tried before a jury and has been twice before the Circuit Court of Appeals. Prior to the first trial the company's plea of the statute of limitations (of Delaware) was rejected on demurrer (R. 15; 206 Fed. 964), and this action was sustained by the Circuit Court of Appeals when the case was in that court the first time (223 Fed. 926, 927-928). The question of the applicability of the statute to a suit by the United States has not since then been an issue in the case. Specifications designed to renew the question were, indeed, included in the assignment of errors when the case was before the Circuit Court of Appeals for the second time (Nos. 1, 15, 25, 26, 27; R. 345, 353, 357) but they were not pressed, *nor were they even relied upon*, as is evident from their omission from the list of "Assignments of error relied upon by the plaintiff in error" in its brief in the court below (pp. 5, 13, 16); and they were altogether omitted from the assignment of errors in this Court (*loci omis.*, R. 379-380, 388-389, 393-394). These omissions can scarcely have been inadvertent. When, therefore, it is remembered that the present writ is prosecuted to review the *second* judgment of the Circuit Court of Appeals, affirming the *second* judgment of the District Court, the supplementary brief now filed by the canal company can only be regarded as a belated invitation to this Court to go outside the record

before it in order to explore the dead issues involved in the earlier proceedings.

The company, tacitly confessing this situation, asserts, when it comes to the third link in its chain of argument (Proposition "C," supplementary brief, p. 2), that—

it is not obligatory that the bar of the statute of limitations must be specifically pleaded—the court itself will, of its own initiative, interpose the bar of the statute of limitations where the question is: whether the right to enter suit is not barred by the statute.

The answer to this last contention is twofold—first, that the proposition itself (so far as applied to the facts and circumstances of this case) is manifestly unsound; second, that the question now before this Court is not whether the Government's "right to enter suit" (or, more accurately, to *maintain* suit, once having instituted it) is barred by the statute of limitations, but is on the contrary a different question entirely, namely, *whether the Government, upon the second trial of this case, proved nonpayment of its claim by competent and sufficient evidence.* Upon the proposition that the Court will itself interpose the statute no authorities are cited and no argument is adduced, and the proposition is, so far as we are aware, unsupported by any known principle of law (leaving out of view the limited class of cases where courts of their own motion invoke the statute of limitations for the benefit of wards of the court, or litigants not *sui juris* and not properly represented).

Assuming, however, that the court should disregard the procedural irregularity and consider that the question of the applicability of the statute of limitations is properly before it, there is no merit, it is submitted, in the canal company's contentions. It is well settled that a State statute of limitations will not bar an action brought by the Federal Government. *Chesapeake & Delaware Canal Company v. United States*, 206 Fed. 964; 223 Fed. 926, 927-928; *United States v. Nashville &c. Ry. Co.* 118 U. S. 120, 125; *United States v. Thompson*, 98 U. S. 486, 490; *United States v. Beebe*, 127 U. S. 338, 344; *United States v. Des Moines &c. Ry. Co.*, 142 U. S. 510, 538; *United States v. American Bell Telephone Co.*, 159 U. S. 548, 554; *United States v. Bell Telephone Co.*, 167 U. S. 224, 264-265; *Guarantee Co. v. Title Guaranty Co.*, 224 U. S. 152, 155-156; *United States v. Whited & Wheless, Ltd.*, 246 U. S. 552, 561; *United States v. St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 313-315.

In *United States v. Nashville &c. Ry. Co.*, *supra*, Mr. Justice Gray said (p. 125):

It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound. *Lind-*

sey v. Miller, 6 Pet. 666; *United States v. Knight*, 14 Pet. 301, 315; *Gibson v. Chouteau*, 13 Wall. 92; *United States v. Thompson*, 98 U. S. 486; *Fink v. O'Neil*, 106 U. S. 272, 281.

The case against the railway company was a suit by the Government upon negotiable coupons of bonds of the railway which the Government had purchased. The action would have been barred by a statute of the State of Tennessee if the suitor had been a private individual. This court held, however, that the statute was inapplicable to the Government. In the present case the suit is for dividends accruing upon stock of the canal company owned by the Government, the subscription for which was originally authorized by Congress during the administration of John Quincy Adams, 4 Stat. 124, 350, cc. 76, 27, in aid of the construction of the company's canal. It can be no impairment of the Government's sovereign status in this case, as the canal company's supplementary brief seems to suggest, that the stock was acquired pursuant to the express authorization of Congress.

The case of *United States Bank v. Planters' Bank*, 9 Wheat. 904, on which the company relies, supports no such position. The case merely holds that the United States or a State on becoming a stockholder in a bank or other corporation *does not thereby impart sovereignty to such institution*. Thus the United States in becoming a stockholder of the canal company did not confer sovereignty upon the company. It does not in the least follow (but quite the reverse)

that the United States has laid aside its own sovereign capacity to sue the company regardless of any local State statute of limitations.

In concluding, it is proper to state that Propositions "D" and "E", referred to in the supplementary brief, page 2, as questions considered in the main argument, are not the real issues presented by this record. There is no dispute, for example, that the burden of proof was upon the Government to establish nonpayment. The only real issue is whether the Government did in fact establish nonpayment (a) by competent evidence, and (b) by sufficient evidence. (Government's main brief, pp. 18 *et seq.*, 45 *et seq.*)

Respectfully submitted:

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CHESAPEAKE & DELAWARE CANAL COMPANY
v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT.

No. 192. Argued April 17, 1919.—Decided May 19, 1919.

It is a perversion of the rule requiring assignments of error to multiply them unnecessarily. P. 124.

State statutes of limitations and the principle of laches are inapplicable to the United States when asserting governmental rights. P. 125.

Seem, that the presumption of payment arising from the lapse of twenty years without suit to collect does not apply to the United States in such cases. *Id*.

The collection of dividends declared on corporate shares owned by the United States is an assertion of its right as creditor unaffected by its relations as shareholder, and, in suing for such dividends, they being public moneys applicable only to public purposes, the United States acts in its governmental capacity. P. 126.

Books of the Treasury Department, showing the miscellaneous receipts and disbursements of the Government, printed from the written public records of the Department, pursuant to the acts of Congress and Art. I, § 9, cl. 7, of the Constitution, and used as original records in the daily business of the Department and produced from its custody, *held*, competent evidence, without certification under Rev. Stats., § 882, for the purpose of proving the nonpayment as well as the payment of dividends by a private corporation to the United States. P. 127.

Evidence *held* sufficient to show that dividends sued for by the Government many years after they were declared were never paid, and to sustain refusal of defendant's motion for a directed verdict. P. 129.
240 Fed. Rep. 903, affirmed.

THE case is stated in the opinion.

Mr. Charles J. Biddle, with whom *Mr. Charles Biddle*, *Mr. Andrew C. Gray*, *Mr. J. Rodman Paul* and *Mr. R. Mason Lisle* were on the brief, for plaintiff in error.

The Solicitor General, Mr. Assistant to the Attorney General Todd and Mr. Lincoln R. Clark, for the United States, submitted.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1912 the United States sued the Canal Company to recover the amount of three dividends which had been declared on shares of its capital stock owned by the Government, in the years 1873, 1875, and 1876, payment of which, it was averred, had been refused when demand was made therefor in the year 1911.

After various vicissitudes the case went to trial on issue joined on the plea of payment by the Company and it comes into this court on writ of error to the Circuit Court of Appeals for the Third Circuit.

There are forty-one assignments of error in this court, which counsel in their brief compress into five questions, and these resolve themselves, at once, into three, viz.: (1) The applicability of the statute of limitations of the State of Delaware; (2) The admissibility in evidence of certain books of the Department of the Treasury; and (3) The propriety of a requested instruction in favor of the Canal Company.

Such a record constrains us to repeat the following:

"This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on." *Phillips & Colby Construction Co. v. Seymour*, 91 U. S. 646, 648; *Grayson v. Lynch*, 163 U. S. 468, and *Central Vermont Ry. Co. v. White*, 238 U. S. 507.

The plea of the statute of limitations was rejected by both lower courts, and, although the specific assignment of this ruling as error in the Circuit Court of Appeals is

not repeated in this court, it will be considered because possibly embraced within some of the general assignments.

Both lower courts ruled that the Government was not bound by the state statute of limitations and that the doctrine of laches was not applicable to it, but they agreed that a rebuttable presumption of payment arose after the lapse of more than twenty years from the date when the debt became due, without suit being instituted to collect it, and that, this appearing from the pleadings of the Government, the burden was upon it of overcoming the presumption by evidence that payment, as it averred, had not been made. The Company, without introducing any testimony, relied wholly upon this presumption of payment.

Although the burden of the responsibility of proving non-payment was accepted by the Government, the Canal Company, nevertheless, argues that the state statute of limitations is also applicable.

It is settled beyond controversy that the United States when asserting "sovereign" or governmental rights is not subject to either state statutes of limitations or to laches.

That the doctrine of laches is not applicable to the Government was announced by Mr. Justice Story on the Circuit in 1821 and afterward in 1824 authoritatively, upon principle, in *United States v. Kirkpatrick*, 9 Wheat. 720.

This rule has been often approved and was applied so lately as *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409.

That the United States is not bound by state statutes of limitations is settled with equal definiteness in *United States v. Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120; *United States v. Whited & Wheless*, 246 U. S. 552, 561.

Whether this rule extends to and includes the presumption of payment arising from the lapse of twenty years

without suit to collect is not questioned by appropriate exceptions in the record before us, and it is, therefore, not decided. It is not intended, however, to approve the holding of the Circuit Court of Appeals on this subject. *United States v. Thompson*, 98 U. S. 486, 489, and cases hereinbefore cited.

The contention of the Canal Company that the Government by becoming a stockholder in a private corporation so abdicated its governmental character that, under the circumstances of this case, it was bound as a private person by statutes and rules of limitation, cannot be allowed.

If the Government were asserting any rights with respect to the conduct of the corporation's affairs, its contracts or its torts, then its rights, duties and privileges would be no greater than those of any other stockholder. *Bank of the United States v. Planters' Bank*, 9 Wheat. 904, 907. But here the Government is pursuing a right to recover, which is not affected by its relation to the corporation as a stockholder. The declaration of the dividends, which is admitted, gave it the status of a creditor of the company, and, thereafter, the right to recover was unaffected by any stockholder relation. To this must be added that the statutes and rules of limitation relate to the remedy to enforce the right, and not to the corporate relation from which the right springs, and that, since these dividends constituted "public money" applicable to public purposes only, the Government in collecting them was acting in its governmental capacity as much as if it were collecting taxes, such as those with which, no doubt, the stock which produced the dividends was purchased. The Circuit Court of Appeals answered this contention in a manner not to be improved upon, saying (223 Fed. Rep. 926, 928):

"We may perhaps add a few words to say that the fallacy of the company's argument seems to lurk in the assumption that in this action the government is asserting a right

in its character as a stockholder. Undoubtedly the right came into being because the government owns the stock, but in no other respect has the suit anything to do with such ownership. The government is not suing as a stockholder; it is suing as a creditor, and in this character alone is it now to be considered."

The questions remain as to the admissibility of the books and the sufficiency of the evidence to carry the case to the jury.

The Government produced a witness who testified that he, in conspiracy with another employee of the Canal Company, embezzled the amount of these dividends and that to conceal their crime they placed in the files of the Canal Company, from which they were produced in evidence, forged drafts purporting to have been drawn by Assistant Treasurers of the United States upon the Treasurer of the Canal Company for payment of these dividends and also what purported to be receipts therefor. This witness testified that until 1886, when he left the employ of the Canal Company, no notice of the declaration of the three dividends in controversy had been sent to the Government, as had been the practice when earlier dividends were declared; that until that time no payment of them had been made, and that the names signed to the drafts and receipts were fictitious.

The Government also produced the notices by the Canal Company of the declaration of each of the fourteen earlier dividends and the record of the payment of them.

To supplement this evidence the books were produced in evidence, the admission of which is assigned as error.

Employees of the Department of the Treasury, who produced the books, testified: that they were records of the Department compiled by authority of law under the direction of the Secretary of the Treasury and were the volumes in daily use by officials and employees in the discharge of their duties; that part of them were printed

from the original records of miscellaneous revenues, in which such dividends would be classed, while others were printed compilations from books not of original entry, and the testimony was that the volumes produced were intended to, and the witnesses believed did, show all of the miscellaneous receipts and disbursements of the Government from 1848 to 1914. They showed the receipt by the Government of fourteen dividends paid by the Canal Company prior to those in controversy and the witnesses testified that a careful search made by them failed to discover any record in the books of the receipt of any of the three dividends sued for. There was an elaborate description of the method employed by the Department of the Treasury in keeping its accounts and of the necessarily contemporaneous character of the original entries, which it is not necessary to rehearse. The copies produced were printed by the Public Printer.

The objection is that these are not books of original entry and that they are not certified as copies of public records are required to be by Rev. Stats., § 882.

It is enough to say of this last contention that although the books admitted were printed from written public records, they were so printed by authority of law and were produced from the custody of the Department of the Treasury, where they were used as original records in the transaction of the daily business of the Department and therefore they did not require certification.

They were public records, kept pursuant to constitutional and statutory requirement. Constitution of the United States, Article I, § 9, cl. 7; Act of Congress, approved September 2, 1789, c. 12, § 2, 1 Stat. 65; Rev. Stats., § 257; Act of Congress, approved September 30, 1890, c. 1126, 26 Stat. 504, 511; Act approved July 31, 1894, c. 174, § 15, 28 Stat. 162, 210. Thus, their character as public records required by law to be kept, the official character of their contents entered under the sanction of public duty,

the obvious necessity for regular contemporaneous entries in them and the reduction to a minimum of motive on the part of public officials and employees to either make false entries or to omit proper ones, all unite to make these books admissible as unusually trustworthy sources of evidence. *Gaines v. Relf*, 12 How. 472, 570; *Bryan v. Forsyth*, 19 How. 334, 338; *Post v. Supervisors*, 105 U. S. 667, 670; *Oakes v. United States*, 174 U. S. 778, 783, 796; *Holt v. United States*, 218 U. S. 245, 253. Obviously such books are not subject to the rules of restricted admissibility applicable to private account books. The considerations which we have found rendered the books admissible in evidence as tending to prove the truth of the statements of entries contained in them also make them admissible as evidence tending to show that because the receipt of the dividends was not entered in them they were not received and therefore were not paid. The evidence may not be as persuasive in the latter case as in the former, but that it was proper evidence to be submitted to the jury for the determination of its value we cannot doubt. Such books so kept presumptively contained a record of all payments made and the absence of any entry of payment, where it naturally would have been found if it had been made, was evidence of nonpayment proper for the consideration of the jury. *United States v. Teschmaker*, 22 How. 392, 405; *State v. McCormick*, 57 Kansas, 440; *Bastrop State Bank v. Levy*, 106 Louisiana, 586; *Wigmore on Evidence*, § 1531, § 1633, par. 6.

We agree with the Circuit Court of Appeals that the evidence introduced carries clear conviction that the dividends were never paid, and that the request of the Canal Company for an instructed verdict in its favor was properly denied. The judgment of the Circuit Court of Appeals is

Affirmed.